

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HODELL-NATCO INDUSTRIES, INC.,

08CV2755

Plaintiff,

vs.

July 1, 2015
7:45 A.M.

SAP AMERICA, INC., ET AL.,

Volume 13

Defendants.

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE DONALD C. NUGENT
UNITED STATES DISTRICT JUDGE
AND A JURY

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18 Proceedings recorded by mechanical stenography;
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WEDNESDAY, JULY 1, 2015, 7:55 A.M.

3

THE COURT: Be seated, please.

4

All right. Thanks, everybody, for being so

07:55:38

5

prompt. We've got a few things to go over.

6

The first is what the claims are going to

7

be, and we had this discussion yesterday, and I think I

8

looked back, as best I could -- you never filed a summary

9

judgment on the contract claim with SAP, I don't believe.

07:56:00

10

MR. STAR: We -- oh, there's so much

11

briefing. We --

12

THE COURT: Doesn't make any difference,

13

but --

14

MR. STAR: We did argue at one point about

07:56:10

15

that claim. I can't remember.

16

THE COURT: You did. You filed a motion to

17

dismiss on it, but --

18

MR. STAR: Filed a motion to dismiss, and I

19

believe we did move for summary judgment on the contract

07:56:20

20

claim arguing that they hadn't shown an actual breach of

21

the documentation -- departure from the documentation.

22

THE COURT: Okay. I couldn't find it, but

23

that doesn't make any difference.

24

MR. STAR: Okay.

07:56:31

25

THE COURT: Ms. Luarde yesterday argued or

1 gave up the argument on the breach of warranty claim, and
2 because the documentation, there's no evidence of what
3 was contained in the documentation, that prompted me
4 again to look at the briefs that you filed the day
07:56:48 5 before, and to look at the -- not only the complaint, but
6 the license agreement, and there's -- the Plaintiff is
7 bound by the license agreement, and there's no other
8 independent breach claim other than the breach of
9 warranty.

07:57:04 10 So the motion pursuant to Rule 50 is
11 granted as to the contract claim.

12 The issue that will go before the jury,
13 issues that will go before the jury is the fraudulent
14 inducement claim against both SAP America and SAP AG.
07:57:25 15 And because SAP America had a relationship with the
16 sellers, we look to the license agreement again to
17 determine whether any of the oral statements can be used
18 in furtherance of that claim by either Mr. Lowery
19 or -- Mr. Lowery or Mr. Van Leeuwen.

07:57:45 20 And the license agreement again completely
21 contradicts the ability, saying that there can't be no
22 warranties and there's no dispute that either Mr. Otto
23 Reidl or Mr. Kevin Reidl had any misunderstanding about
24 what the terms and conditions of the license agreement
07:58:02 25 were. So those oral representations can't be used

1 against SAP America.

2 Now, as to SAP AG, there was no
3 relationship, so there's no agency relationship between
4 Lowery, Van Leeuwen, or SAP AG so those statements can't
07:58:26 5 be used.

6 So there's going to be a couple of, like, I
7 think three written advertising situations that can
8 be -- I'm going to put them in the instructions, but
9 under -- in Exhibit 618, that it is correct that what the
07:58:43 10 Plaintiff wanted to offer, the statement, it supports an
11 unlimited number of simultaneous user transactions, was
12 referring to the MS-SQL 2000 database, not Business One,
13 so that's out.

14 And the other thing is, and this is a
07:59:01 15 little bit different because when the American Express,
16 through Ms. Vitantonio, was trying to present a package
17 to Hodell, she did have some conversation, and generally,
18 that would have been barred, too, but you called her as a
19 witness so that information, her statements can be used
07:59:21 20 in the Plaintiffs' pursuit of their claim for fraudulent
21 inducement.

22 Other than that, I think we're ready to go.

23 The practice has been that I do the
24 instructions, the general instructions first before the
07:59:39 25 argument, and then the parties argue, and then I give the

1 concluding instructions.

2 But if you would like it in the
3 old-fashioned way where you argue first and I give the
4 instructions later, that's fine with me, too.

07:59:50 5 MR. MILLER: We defer to you, Your Honor.

6 MS. LUARDE: We'll defer to you on that,
7 Your Honor.

8 THE COURT: Okay. All right. Then we'll
9 give you a copy of the instructions. We'll give you a
08:00:02 10 chance to review them.

11 And if you have any objections to it or any
12 modifications, let me know before we start. Okay?

13 MR. STAR: Thank you.

14 Your Honor, may I just make a couple points
08:00:13 15 to have them on the record very briefly?

16 First off, with respect to election of
17 remedies on out-of-pocket costs, there was some testimony
18 by Kevin Reidl --

19 THE COURT: I'm sorry, let me say this. I
08:00:24 20 did -- you'll see in the instructions I put in that if
21 they consider the subject of the damages, they can
22 consider the evidence, if any, of out-of-pocket costs,
23 training costs, and training, travel, I think maybe I
24 said -- and what was the third? I can't remember. The
08:00:47 25 business with the 27 employees.

1 MR. STAR: Okay.

2 THE COURT: So I put that in.

3 Those -- those are the three issues that were the subject
4 of damages.

08:00:55 5 MR. STAR: Fine. I'll take a look and --

6 MR. MILLER: Can I clarify since I'm
7 probably doing -- I'm doing the closing?

8 The three items of damages that are out --

9 THE COURT: No, in.

08:01:06 10 MR. MILLER: Okay.

11 THE COURT: You can look at it. You'll
12 see.

13 MR. MILLER: The Profit 21?

14 THE COURT: No.

08:01:15 15 MR. MILLER: Okay.

16 MR. STAR: And one other point, Your Honor.

17 We did discuss the issue yesterday of SAP

18 AG and whether it's subject to the protections of the

19 license agreement. We filed a supplemental brief last

08:01:29 20 night, and just very quickly, as I thought about this

21 more, the question of whether they were third-party

22 beneficiary or an incidental beneficiary is sort of

23 beside the point.

24 The issue here is whether Hodell is bound

08:01:43 25 by the promise it made as part of its bargain for

1 exchange when it entered into the license agreement with
2 SAP America.

3 And this is the same sort of thing that all
4 of us are used to every day. For instance, if you have a
08:01:58 5 settlement agreement, all right, the release or
6 indemnification provisions in those settlement agreements
7 almost always flow to people who are not actually
8 signatories to the contract. They don't even need to
9 know that they're signing the contract, right?

08:02:10 10 If I were sued, I could -- I could agree to
11 settle a claim and have my wife and my children released,
12 and they might not even have known I was sued. And that
13 release against those individuals who might not have even
14 known about the release would be fully enforceable so
08:02:28 15 that if the other party to the lawsuit had come back then
16 and tried to sue my wife or children, they wouldn't be
17 able to do it. The release and the indemnification
18 provision would hold up.

19 And that's where we are with this. The
08:02:40 20 beneficiary, third-party beneficiary question, goes to an
21 unrelated point as to whether a party who is named in a
22 release or indemnification provision can actually just be
23 sued in their own right on the contract, or whether they
24 could sue on the contract.

08:02:53 25 What we're dealing here, though, with is a

1 defense, right, a defense of release and indemnification.
2 And to go around the license agreement with respect to
3 SAP AG in the way that Hodell is suggesting, I would say
4 would undo all of the jurisprudence that we're all used
08:03:16 5 to and that everybody in this country relies on all the
6 time when we settle claims.

7 THE COURT: How is it relevant at this
8 juncture?

9 MR. STAR: How is it relevant at this
08:03:28 10 juncture?

11 Well, I'm not quite sure where Your Honor
12 has come out with respect to what protections SAP AG
13 itself gets under of the license agreement.

14 I do understand you to say the Plaintiffs
08:03:38 15 are bound by the contract they signed. That contract
16 they signed includes damages limitations provisions that
17 clearly apply to claims and remedies against SAP AG.

18 THE COURT: All right. But you asked
19 pursuant to Rule 50 to dismiss the breach of contract
08:03:53 20 claim, and that was done based on the evidence in the
21 case, so that damages limitation is out.

22 MR. STAR: Yes, but what that means is that
23 the contract stands, right? There is no claim that the
24 contract was breached.

08:04:04 25 THE COURT: Right.

1 MR. MILLER: We didn't waive the contract,
2 Your Honor. We just said --

3 THE COURT: Yes, I know. This is an
4 argument that could be made afterwards.

08:04:12 5 We don't have to do it now. I mean, I
6 think that --

7 MR. MILLER: We have the rights under the
8 contract still. We didn't say tear up the contract.

9 THE COURT: Well, they have an independent
08:04:23 10 tort. Don't worry.

11 MR. MILLER: I understand it.

12 MR. LAMBERT: The fraudulent inducement
13 claim is that you can't stand behind a contract that has
14 been fraudulently induced. That's the whole point.

15 THE COURT: You're preaching to the choir.

16 MR. LAMBERT: Thank you, Your Honor.

17 THE COURT: Okay.

18 MR. MILLER: It's on the marketing
19 documents and there's not an agency with SAP AG.

08:04:40 20 Yesterday there was a discussion about, and
21 I contributed to some of the confusion, about what
22 exactly is Hodell saying was misleading in the marketing
23 materials, and we had three documents. One of them was
24 618.

08:04:52 25 THE COURT: You'll see it right in the

1 charge.

2 MR. MILLER: Okay. Thank you.

3 THE COURT: We have that.

4 Okay. We'll see you in a bit. Tell me

08:04:58 5 when you're ready. Okay?

6 MS. LUARDE: Thank you, Your Honor.

7 THE COURT: I'm supposing that you got all
8 the documents in order.

9 MR. STAR: Well, we --

08:05:08 10 MR. CARNEY: I wouldn't say that, Your
11 Honor.

12 THE COURT: You know, I've been doing this
13 for 31 years, and never once have lawyers the next day
14 said, "Okay, we got all the exhibits in order" according
08:05:21 15 to what I had said the day before.

16 So this is nothing new.

17 MR. CARNEY: We have a couple of
18 objections.

19 THE COURT: All right. We can do it later.
08:05:28 20 All right.

21 (Recess taken).

22 THE COURT: Be seated, please.

23 Okay. Somebody has some objections on the
24 charge?

08:49:54 25 MS. LUARDE: Yes, Your Honor.

1 THE COURT: Okay. Fire away.

2 MS. LUARDE: Thank you. It might be better
3 for me to go to the podium so Sue can hear me okay.

4 THE COURT: Okay.

08:50:11 5 MS. LUARDE: A couple of things, Your
6 Honor.

7 Before I go into the objections, I would
8 like some clarification with regard to the oral
9 representations that were made by Mr. Van Leeuwen and
08:50:27 10 Mr. Lowery and Ms. Vitantonio with regard to the number
11 of users that Business One would support.

12 In particular, I understand, based on the
13 instructions, that the agency argument is out and that
14 the oral misrepresentations are no longer in play, but
08:50:49 15 these misrepresentations go to reliance and my clients'
16 reliance on the marketing materials.

17 Based on the materials that he received
18 from SAP, the materials made a statement and the oral
19 representations back that up, and he --

08:51:12 20 THE COURT: I'm going to cut you off
21 because I know what the evidence is, but the license
22 agreement bars that for SAP America. And there was no
23 agency relationship between Van Leeuwen or Lowery and SAP
24 AG. So you can use the written material, but not the
08:51:34 25 oral representations, other than Ms. Vitantonio, because

1 the Defense called her as a witness, and her testimony is
2 here. You can discuss that.

3 MS. LUARDE: Okay. All right. Your Honor,
4 a couple things.

08:51:46 5 We have a lot of objections, I think you
6 could imagine, with regard to the agency component here,
7 and I'd like to address that if I may.

8 THE COURT: You can just do a general
9 objection. You don't have to rehash everything.

08:51:59 10 MS. LUARDE: Okay. Your Honor, we would
11 request and object to the lack of agency instructions
12 because we believe that LSi was acting with apparent
13 authority for both SAP AG and SAP America.

14 THE COURT: Okay. I'm sorry, Sharon, but
08:52:21 15 you're making the same argument. We've had this.

16 MS. LUARDE: Okay. I just want to make
17 sure it is clear.

18 THE COURT: It is. It's very clear.

19 MS. LUARDE: Okay. I apologize if it's too
08:52:31 20 much.

21 The other objection we have to the
22 instructions, the OJI actually states for essential
23 elements of fraud that it's not clear and convincing
24 evidence but preponderance of the evidence, and so I
08:52:48 25 think the clear and convincing is not correct in the

1 instructions.

2 THE COURT: Well, we got that right out of
3 *Glazer versus Lehman Brothers* here in the Sixth Circuit.

4 MS. LUARDE: Yeah, we pulled ours from OJI
08:53:03 5 so I think the standard --

6 THE COURT: Jennifer, get that. It's in my
7 office. You know where it is.

8 MS. LUARDE: And the other instruction
9 would relate to punitive damages. We notice that there's
08:53:14 10 no punitive damage charge. We believe that with an
11 intentional tort claim such as fraud, that we're entitled
12 to such a charge.

13 THE COURT: Okay.

14 MS. LUARDE: And, Your Honor, I believe
08:53:42 15 that's, you know, since I have to keep this general,
16 those are the objections that we have.

17 THE COURT: Thank you.

18 MR. STAR: Your Honor, very briefly. No
19 objections to the charge whatsoever.

08:53:55 20 I just thought with respect to the verdict
21 sheets, that there was a potential for some confusion to
22 the jury just because in openings and then throughout the
23 last couple of weeks, they have heard about all of these
24 supposed oral representations. And it's very clear from
08:54:10 25 the instructions that we're down to simply the question

1 of whether there were false statements in writing in
2 those two exhibits, 314 and 617.

3 My suggestion, if I can be so bold as to
4 make a suggestion, would be on the two verdict sheets,
08:54:29 5 simply to add a phrase at the end of the sentence where
6 presently the sentence reads, "We, the jury, being duly
7 impaneled and sworn, find by clear and convincing
8 evidence in favor of blank on Plaintiff's claim of fraud
9 in the inducement," and I would ask "based on the written
08:54:45 10 representations made in Exhibits 314 or 617."

11 THE COURT: I think the instructions cover
12 that.

13 MR. STAR: Thank you, Your Honor.

14 THE COURT: Do you agree with the Plaintiff
08:55:34 15 in its preponderance of the evidence?

16 MR. STAR: Not at all. In fact, we had a
17 proposed jury instruction number 15, evidence required
18 for fraudulent misrepresentation especially where you're
19 alleging, as they are here, a fraud in the inducement to
08:55:50 20 set aside a contract, "That fraud must be proven with
21 clear and convincing evidence."

22 That's taken from the Federal Jury Practice
23 and Procedure Instructions. It's also taken from OJI,
24 OJI Instruction 303.07. It also comes from the Sixth
08:56:11 25 Circuit case of *Micrel versus TRW*, Your Honor. I can

1 hand this to you, if Your Honor would like.

2 THE COURT: I had the *Glazer* case out here
3 somewhere.

4 MR. STAR: Okay. The *Micrel* case is from
08:56:26 5 the Sixth Circuit. The citation is 486 F. 3d 866, Sixth
6 Circuit, 2007. Here's a quote. "When a Plaintiff seeks
7 to set aside a written document, clear and convincing
8 evidence of fraud is required."

9 That's also been the holding of the Ohio
08:56:43 10 Supreme Court in a case called *Household Financial*
11 *Corporation versus Altenberg*, A-L-T-E-N-B-E-R-G. That's
12 5 Ohio 2d. 190. It's a 1966 Ohio Supreme Court case.
13 "In an action to set aside a contract, clear and
14 convincing evidence of fraud is required."

08:57:06 15 MS. LUARDE: Your Honor, the citation that
16 we have is OJI 449.03.

17 And one other thing that I forgot to raise
18 at the podium, Your Honor, is the law of the case in this
19 particular case with regards to the fraudulent
08:57:29 20 inducement.

21 It's been clear that Judge Wells and
22 Magistrate Judge White concluded that SAP America and SAP
23 AG could also have been found to
24 fraudulently -- fraudulently induce the development
08:57:51 25 agreement itself, which pre-dates the license agreement

1 by one year. And so that claim also would remain.

2 And --

3 MR. LAMBERT: Just for the record, also, I
4 don't believe that -- there is a duty to mitigate
08:58:09 5 instruction. I don't think there's a duty to mitigate in
6 a fraud case so I don't think that instruction should be
7 given. I just note that for the record.

8 THE COURT: All right. As to the punitive
9 damages, in the event there's an award in favor of the
08:58:32 10 Plaintiff, we will discuss that afterwards, sever that
11 claim.

12 MS. LUARDE: Thank you.

13 MR. LAMBERT: Your Honor, can I just note
14 one final thing with regard to the oral representation
08:59:05 15 argument?

16 THE COURT: Yes.

17 MR. LAMBERT: We've argued in the case that
18 SAP AG and SAP America could still be responsible for the
19 oral misrepresentations if LSi and/or IBIS and/or
08:59:20 20 American Express were acting as conduits through which
21 the misrepresentations were made. In other words,
22 regardless of whether there was agency, if SAP told
23 Van Leeuwen and IBIS that 500 users is appropriate for
24 Business One and allowed them to pass it through to
08:59:41 25 Hodell, we believe under the case law, and I think this

1 was in Judge White's Report & Recommendation, that as
2 long as they made the statement to Van Leeuwen and
3 allowed it to be passed through to Hodell, they could
4 still be responsible for it regardless of whether there's
08:59:55 5 an agency relationship.

6 THE COURT: Well --

7 MR. LAMBERT: I believe Your Honor might
8 see it the other way, but I wanted to make that for the
9 record.

09:00:08 10 THE COURT: I do. I mean I'm basing it not
11 only on the law but on the license agreement, which is
12 pretty clear that they understood that they weren't
13 disclaiming anybody and wouldn't have had any ability,
14 outside or otherwise, to make any representations.

09:00:19 15 All right. I'm reading from *Glazer versus*
16 *Lehman Brothers*. That's a Sixth Circuit appellate case,
17 2005. "Under Ohio law, a Plaintiff must prove six
18 elements in order to prove fraudulent inducement. He
19 must prove those six elements by clear and convincing
09:00:46 20 evidence."

21 And they cite *Davis versus Sun Refining and*
22 *Marketing Company*, 109 Appellate 3d. 42, and that's a
23 1996 case, and also in the OJI instructions. It says
24 that "The degree of proof on contracts or to set aside a
09:01:11 25 document for fraud is clear and convincing evidence."

1 That's *Cross versus Ledford*, a 1954 case from the Ohio
2 Supreme Court.

3 So I think I've correctly stated the burden
4 of proof and the legal standard for that, that's clear
09:01:28 5 and convincing evidence.

6 All righty. Then we're ready to go.

7 (Proceedings resumed in presence of the
8 jury as follows:)

9 THE COURT: Good morning, ladies and
09:04:00 10 gentlemen.

11 THE JURORS: Good morning.

12 THE COURT: Get your sleep last night?

13 All right. Have a seat.

14 As you probably know, the parties have
09:04:10 15 rested their cases, and we've gone over all the necessary
16 legal issues that we have to go over, and now it becomes
17 that part of the trial where I instruct you on the law
18 that applies in the case, and the lawyers have an
19 opportunity to argue their cases to you.

09:04:29 20 What I'm going to do is give some general
21 instructions first about the nature of your duties and
22 responsibilities, the law of the specific claims in this
23 case, and then the lawyers will argue their case, after
24 which, I will give you your final or concluding
09:04:51 25 instructions.

1 And then you will retire in your
2 deliberations.

3 Now, it's important that -- and I have to
4 say, forgive me for reading the instructions, but I do so
09:05:03 5 out of an abundance of caution to ensure that I don't
6 misstate the law to you.

7 And so kind of special day for you because
8 Jayden wanted to come today and he went down and met you,
9 didn't he?

09:05:18 10 THE JURORS: Yes.

11 THE COURT: He was excited about that. He
12 was here at, like, 7:15. I think you may be the subject
13 of a book report or something when he goes back to school
14 this fall.

09:05:33 15 Anyway, all right, ladies and gentlemen of
16 the jury, we now come to the part of the trial where the
17 Court gives the jury the law in the case.

18 Before I start, I want to tell you
19 something about the charge to the jury. As I've told you
09:05:45 20 several times, the jury, you, are the trier of the facts,
21 and the Court makes all of the determinations of law.

22 To help you understand the charge and to
23 simplify it, I've divided it into three parts.

24 The first portion of the charge deals with
09:05:59 25 the general law that is applicable in almost every civil

1 case. It defines what evidence is, the burden of proof,
2 the credibility of the witnesses, and the function of the
3 Court and the jury, and other similar matters.

4 The second area discusses the law that
09:06:16 5 applies in this specific case. I will review with you
6 the law that applies in this case and the various
7 elements of that law. I will also define for you terms
8 that may require definition. As I told you when we
9 began, some of the terms are common and generally
09:06:34 10 understood and do not require definition or explanation.
11 I will then instruct you as to your duties in regards to
12 your findings and any potential verdict.

13 And after I tell you about the law that
14 applies in this case, I will give you instructions
09:06:49 15 concerning your deliberation. This will include the
16 interrogatory or question I'll send back to you and the
17 election of a foreperson and how you'll conduct yourself
18 during your deliberations.

19 Following that, the case will be turned
09:07:02 20 over to you for your consideration.

21 Now, I ask you to follow what I say because
22 every aspect of the law and everything is of equal
23 importance.

24 Now, you have heard the evidence, but you
09:07:16 25 have not yet heard the arguments of counsel. It is now

1 the duty then of the Court to instruct you on the law
2 that applies in this case.

3 As I told you, the Court and the jury have
4 separate functions. You decide the disputed facts, and
09:07:29 5 the Court provides you with instructions of law.

6 It is your sworn duty to accept these
7 instructions and to apply the law as it is given to you
8 by me. Then that means that you are not permitted to
9 change the law, nor to apply your own conception of what
09:07:48 10 you think the law ought to be.

11 In keeping with your oath then, you will
12 not be swayed or influenced by considerations extraneous
13 to the law and the evidence, such as sympathy for, or
14 bias or prejudice against, either party to this lawsuit.

09:08:04 15 Now, while it is your duty to follow and
16 apply to this case the law that the Court now gives you,
17 remember that you, and you alone, are the judges of the
18 facts. And in this respect, you are to exercise your own
19 judgment without regard to anything which the Court may
09:08:20 20 have said or done during the course of the trial.

21 Now, during the trial, as you know, the
22 Court has been requested to rule upon objections made by
23 both counsel for the Plaintiff and for the Defendant.
24 These objections presented legal questions, and the
09:08:35 25 Court, in deciding each one of them, has endeavored to

1 follow the law. So you will draw no inference of any
2 kind from the manner in which the Court has ruled upon
3 any question of law, nor will you, because of any
4 expression of the Court or other act of the Court, infer
09:08:52 5 that the Court entertains any notion whatsoever as to the
6 facts in this case.

7 The Court must not, and therefore, does
8 not, seek to invade the province of the jury in
9 determining the issues which you are called upon to
09:09:05 10 decide. Insofar as you are concerned, the Court has no
11 opinion on the matters which it is your responsibility to
12 decide.

13 Now, in this case what you have before
14 you -- I'm just giving you a general overview, you know
09:09:19 15 what it's about, but when you go through a case and you
16 hear a lot of things, some things may be relevant to your
17 consideration, and some things may not be, depending on
18 what the final claim or claims in the case are.

19 In this case, the claims are the Plaintiff,
09:09:35 20 Hodell-Natco, has filed a lawsuit against two entities.
21 It's SAP America and SAP AG. And in those claims, they
22 say they were fraudulently induced to enter into the
23 license agreement, and as a result of that fraudulent
24 inducement, they have suffered some damage. And that's
09:10:01 25 what you're here to decide. But I'll get into that as we

1 go along. Okay. That's just generally what the claim
2 is, and you know that, you've heard that throughout the
3 trial.

4 Now, at the commencement of trial, counsel
09:10:13 5 for the Plaintiff and counsel for the Defendant addressed
6 to you in what we have referred to as opening statements.
7 In those opening statements, they sought to outline for
8 you what they expected the evidence to show. In short
9 order, they'll be presenting final arguments, and I'll
09:10:28 10 give you a comment about how to consider final arguments
11 when we come to that time.

12 Now, opening statements, though, and
13 closing arguments are proper in an effort to assist you,
14 but you are instructed that they do not constitute
09:10:44 15 evidence and, therefore, will not be so considered by
16 you. Nor will you consider as evidence any testimony
17 which the Court may have withdrawn from your
18 consideration or has instructed you to disregard.

19 So whenever reference is made to evidence
09:10:59 20 upon which this case is to be decided, the jury will
21 understand that the evidence includes all the testimony
22 that you heard from the mouths of the several witnesses
23 who testified here during the course of the trial,
24 together with any exhibits that have been offered and
09:11:13 25 received into evidence during the course of the trial and

1 will go with you in your jury room, and any stipulations
2 or admissions like we talked about back on the first day.

3 Now, evidence may be either direct or
4 circumstantial. I mean, I'm sure you've all heard those
09:11:29 5 terms, right? Direct evidence is a recital of facts by
6 witnesses who have actual knowledge as to what
7 transpired. It is the testimony given by a witness who
8 has actually seen or heard the things concerning which
9 that witness has testified.

09:11:44 10 Now, circumstantial evidence, on the other
11 hand, is proof of facts or circumstances from which the
12 jury may infer other connected facts or related facts
13 which naturally and logically follow according to the
14 common experience of mankind.

09:11:59 15 Now, back in the days when I was a lawyer,
16 and I heard Judges give these instructions about direct
17 and circumstantial evidence, sometimes I was confused and
18 I thought I knew what I was talking about as a lawyer.
19 And so I try to give a little example about this so you
09:12:18 20 can understand.

21 Now, direct evidence is something perceived
22 by the senses. Okay? So right now, if I gave you an
23 example, you're all looking at me, I hope, and then I
24 take my left index finger and I say that and I touch it
09:12:32 25 here on this piece of wood. You could all come and

1 testify that you saw me put my left index finger on that
2 piece of wood on July 1st, 2015 at about 9:10 a.m. in the
3 morning. All right? Because you saw me do it. That
4 would be direct evidence of it.

09:12:48 5 Now, if we all left the courtroom, and I
6 did the same thing, I still put my left index finger on
7 that piece of wood, right? So if somebody wanted to be
8 able to prove that I did that, how would they go about
9 it? Because no one saw me do it. No one smelled me do
09:13:05 10 it, heard me do it, felt me do it, right? Nothing
11 perceived by the five senses.

12 So when you watch NCI Los Angeles or
13 whatever those shows are, Law & Order I guess is the
14 better one, you've all seen fingerprint evidence
09:13:23 15 testimony or things in the media, that's a legit art. So
16 what happens is a fingerprint technician would come in or
17 police officer and would testify that, yeah, listen,
18 we've proved that no two fingerprints are alike,
19 everybody's fingerprint is unique. And so you could say
09:13:45 20 okay, I believe that.

21 And then the technician could come in and
22 say that we are able to lift fingerprints and then
23 compare them with known prints to make a positive
24 identification. So if they, a technician came in here
09:14:01 25 and went to that piece of wood, what they would do,

1 you've all seen it, it's a dark piece of wood, they would
2 put white powder and if it's a light piece of wood, they
3 would put black powder, and they put it on there and you
4 could actually, from the sweat and ridges in your skin,
09:14:18 5 it may leave an imprint. So they could dust that, and
6 put the powder on and dust it with a little brush and
7 then they look at it and then they take a piece of latex
8 tape and put it on it and lift that.

9 That's called a latent fingerprint, okay.
09:14:35 10 And you've heard that term. So the technician could look
11 at that and take it back to the lab and they have a
12 comparison microscope and they have, believe it or not, a
13 system where all our fingerprints are in, they can just
14 push a button, and if there's a match, it does it
09:14:48 15 automatically and then pulls up, would pull up my left
16 index finger and then the technician would look at it and
17 compare the ridges and then, as an expert, could come in
18 and say, "Yep, the left index finger latent print I
19 lifted from that piece of wood on July 1st matches
09:15:05 20 perfectly my known left index finger."

21 All right. So all that I told you, direct
22 evidence, that's what the technician testifies to. But
23 now where is the circumstantial evidence? The
24 circumstantial evidence is you could draw an inference
09:15:19 25 from that direct evidence that some day, at some point, I

1 put my left index finger on that piece of wood. Okay?
2 That's the reasonable inference you could draw from that.

3 And sometimes circumstantial evidence is
4 even more powerful than direct evidence. Why? Because
09:15:36 5 sometimes people say that circumstantial evidence doesn't
6 lie because if you believe that, that means I actually
7 did put my left index finger on that piece of wood
8 ;whereas, you might not believe somebody who said I saw
9 him do it. It's a question.

09:15:49 10 So when I give that example, it's kind of a
11 long-winded example, but it shows there are two types of
12 evidence, direct and circumstantial. The law says
13 neither one is any greater or any lesser of evidence.
14 Then it's up to the jury to decide which evidence you
09:16:06 15 want to believe and how much weight you put on it. And
16 every case, believe it or not, has both circumstantial
17 and direct evidence.

18 Now, I talked about an inference. And an
19 inference is a reasonable deduction of fact. Remember
09:16:19 20 how I explained that? Which logically follows from other
21 facts established by the evidence which you may, but are
22 not required, to make. But you may not build one
23 inference upon another inference.

24 What does that mean? That means you could
09:16:34 25 infer that I put my left index finger on that piece of

1 wood, right, from the evidence, but you couldn't
2 make -- draw another inference in saying when I did it.
3 That's building one inference upon another inference
4 because the fingerprint wouldn't tell you when I did it.
09:16:47 5 It just would say I did it, okay?

6 Although you may not build one inference
7 upon another inference but you may make more than one
8 inference from the same set of facts or circumstances.
9 Those are decisions for the jury to decide.

09:17:01 10 Now, it is the law which you shall consider
11 in your deliberations in this case that a party who
12 asserts the affirmative of a proposition, that is, a
13 person who claims that certain facts exist, must prove it
14 or them by the greater weight of the evidence.

09:17:16 15 Now, there are two different types of
16 burdens of proof in this case: Clear and convincing
17 evidence and preponderance. I'll explain it as we go
18 along, and I think you'll understand when I finish with
19 all this.

09:17:31 20 Now, having considered all the evidence,
21 what you must do is determine whether the parties have
22 met their respective obligations of proving their claims.

23 Now, I said generally the party asserting a
24 proposition to be true has the burden of proof as to that
09:17:45 25 proposition. Burden of proof means the duty of producing

1 evidence to lead you to believe that the facts are as
2 that claimant contends.

3 So when a particular party has the burden
4 of proof on a particular issue, that party must prove the
09:18:00 5 facts material to that issue by the greater weight of the
6 evidence.

7 The burden of proof, then, rests upon the
8 Plaintiff in this case to prove their claim by clear and
9 convincing evidence the essential and material allegation
09:18:16 10 of the complaint which are denied by the Defendant.

11 Now, these affirmative allegations denied
12 by the Defendants constitute the issue or issues of fact
13 which the Plaintiff has the burden of proof by clear and
14 convincing evidence.

09:18:28 15 What do we mean by that? To be clear and
16 convincing, the evidence must have more than simply a
17 greater weight than the evidence opposed to it and must
18 produce in your minds a firm belief or conviction about
19 the truth of the matter.

09:18:46 20 Now, as the sole Judges of the facts, you
21 are also the sole Judges of the credibility of the
22 witnesses and the weight to be given to each person's
23 testimony.

24 To weigh the evidence, you must consider
09:18:57 25 the credibility or believability of each person who

1 testified, so you will apply the tests of truthfulness
2 which you apply in your own daily lives.

3 And in determining the credibility of any
4 witness, you should consider the witness's interests or
09:19:13 5 bias in the outcome of the verdict, if any; the witness'
6 appearance, manner, and demeanor while testifying before
7 you; the witness' candor and frankness or lack of candor
8 and frankness; the consistency of that witness' testimony
9 with the other known facts in the case; the witness'
09:19:34 10 memory or lack of memory; the witness' intelligence or
11 lack of it; and the reasonableness or unreasonableness of
12 the witness' testimony, and the probability of that
13 witness knowing the truth of the facts and circumstances
14 established by the evidence which, in your good judgment,
09:19:50 15 would add to or detract from that person's credibility
16 and the weight you give to that witness' testimony, and
17 which will enable you to determine the degree of
18 credibility which you assign to each witness.

19 Now, you are instructed that one way of
09:20:09 20 impeaching any witness is by showing that that same
21 witness has made a different or contradictory statement
22 or statements on the same point on a former occasion. If
23 you find from the evidence that any witness has been
24 impeached in this manner, you may take that into
09:20:20 25 consideration in determining that person's credibility

1 and the weight you give to that witness' testimony. And
2 you are instructed that you are not bound to believe
3 something to be a fact simply because a witness has
4 stated it to be a fact.

09:20:33 5 If you believe from all the evidence that
6 that witness was mistaken or has testified falsely
7 concerning such alleged fact, you may believe or
8 disbelieve that witness as you see fit.

9 You are not required, then, to believe what
09:20:47 10 a witness has testified to merely because the statement
11 was made on the witness stand or under oath. You may
12 believe all, or part, or none of what any witness has
13 said in accordance with the credit to which you feel that
14 witness is entitled to in the exercise of your honest and
09:21:03 15 impartial judgment.

16 As a matter of law, then, you may believe a
17 portion of the testimony of a particular witness and
18 disbelieve the rest of that witness' testimony, or you
19 are privileged to believe all the testimony of a
09:21:17 20 particular witness, or you may disbelieve all the
21 testimony of any witness. Those are judgments for the
22 jury to make.

23 Now, if statements in a deposition differ
24 from the testimony given by the same witness in the
09:21:32 25 courtroom, you may consider them to test the credibility

1 or the believability of that witness.

2 Evidence has been introduced consisting of
3 transcript questions and answers that were previously
4 asked to various witnesses. Such evidence is also to be
09:21:46 5 considered according to the usual test, normal test, that
6 are applied to all witnesses.

7 Also, you did hear in this case certain
8 expert testimony that has been given. Now, men and women
9 learned in special sciences or, I always have a hard time
09:22:02 10 with this word, peculiarly, I got it, adapted to explain
11 and elucidate a given set of facts in a case are called
12 expert witnesses.

13 The purpose of such expert witness
14 testimony is to assist the jury in judging the facts in
09:22:21 15 order to bring such facts within the better understanding
16 of the jury, if they can. Certain questions may have
17 been asked or propounded in this case and answers given
18 to them by those so-called expert witnesses. In some
19 questions, the facts embodied have been assumed by the
09:22:35 20 witness to be true.

21 If you find that the assumed facts forming
22 the basis of an expert opinion are not true, or -- and/or
23 whether the assumed facts forming the basis of any
24 expert's opinions are unreliable and/or are not worthy of
09:22:51 25 belief in your good judgment, then you may use such

1 information to determine what credit, if any, you are to
2 give to the testimony of any such expert.

3 In other words, just like with all other
4 witnesses, you should weigh and evaluate the testimony of
09:23:07 5 any expert witnesses by considering their background,
6 knowledge, skill, and experience in the subject on which
7 they have rendered an opinion, and considering whether
8 the facts upon which that opinion was based were
9 established to your satisfaction.

09:23:24 10 Now, this case also should be decided or
11 considered and decided by you as an action between
12 persons of equal standing in the community, of equal
13 worth, and holding the same or similar situations in
14 life.

09:23:39 15 A corporation is entitled to the same fair
16 trial at your hands as any private individual. All
17 persons, including corporations, partnerships,
18 unincorporated associations, and other organizations
19 stand equal before the law and are to be dealt with as
09:23:56 20 equals in a Court of justice.

21 When a corporation is involved, of course,
22 is may act only through natural persons as its agents or
23 employees, and in general, any agent or employee of a
24 corporation may bind the corporation by his or her acts
09:24:13 25 and declarations made while acting within the scope of

1 his or her authority that was delegated to him or her by
2 the corporation or within the scope of his or her duties
3 as an employee of that particular corporation.

4 And as I have mentioned to you, a number of
09:24:30 5 exhibits and testimony related to them have been
6 introduced.

7 First, ladies and gentlemen, the numbering
8 or the lettering of the exhibits that you take to the
9 jury room may or may not follow consecutively. A couple
09:24:42 10 reasons for this. First, the party that marked the
11 exhibit may not have offered it into evidence or, second,
12 for some legal reason or procedural ruling, the Court may
13 not have permitted that exhibit into evidence.

14 Rest assured that you will have all the
09:24:58 15 evidence or exhibits that were properly marked and
16 properly received into evidence, and you will not have
17 any others.

18 And we talked about the demonstrative
19 boards that they had. Some were marked, some were not.
09:25:12 20 It's up to the lawyers. They decide which ones they want
21 to go. Some of them are just copies of other documents
22 that you'll have with you when you retire to begin your
23 deliberations.

24 One final comment about exhibits. A lot of
09:25:26 25 times people ask if you can get testimony read back to

1 you. The answer generally is no, even though the ladies
2 are taking everything down. We frown on giving or
3 reading back portions of any testimony because it may
4 highlight that certain portion when you're supposed to
09:25:47 5 take all the evidence together to come to your decision.

6 On the other hand, if you come to an
7 impasse where you say, "I just can't, we can't reach a
8 decision without it," you can always make a request to
9 the Court, and I'll take that into consideration. So I'm
09:26:01 10 not completely foreclosing that possibility.

11 Now, as to exhibits, it's just like
12 testimony; it's up to the jury to decide what weight, if
13 any, that you give to any exhibit.

14 I'm now going to instruct you on the law as
09:26:15 15 to the specific claims in this case. And when I say in
16 these instructions that a party has the burden of proof
17 on any proposition or use the suppression "if you find or
18 if you decide," that means you must be persuaded
19 considering all the evidence in the case as to the claim,
09:26:33 20 first, that the Plaintiff has proved that by clear and
21 convincing evidence. And then when you get to damages,
22 I'll talk about what preponderance of the evidence is.

23 Now, in this case Hodell asserts that it
24 received certain false representations upon which it
09:26:49 25 relied in deciding to enter into the license agreement.

1 Hodell does not allege that it received any direct,
2 verbal, false representation from SAP, but Hodell does
3 allege that it received false written representations
4 from SAP AG and SAP America in the form of marketing
09:27:13 5 literature concerning Business One.

6 Specifically, Hodell asserts that it relied
7 on the representations made by SAP AG and/or SAP America
8 in Exhibits 314 and 617, including the following
9 statements: "SAP Business One brief. Quote, the
09:27:36 10 solution helps emerging businesses from those with 10 to
11 several hundred employees to streamline their operational
12 and managerial processes."

13 That's Exhibit 314.2.

14 "SAP solution brief. Quote, whether you
09:27:54 15 have 5 employees or 500, the solution helps emerging
16 businesses streamline their operational and managerial
17 processes." That's Exhibit 314.5.

18 "SAP Business One Solution effectively
19 supports companies with as low as 10 and as many as
09:28:13 20 several hundred employees." That's in Exhibit 617.6.

21 SAP AG and SAP America deny that any
22 misrepresentation was made to Hodell and assert that the
23 statements in their marketing literature were true.

24 A claim of fraud in the inducement arises
09:28:35 25 when a party is induced to enter into an agreement

1 through fraud or misrepresentation. A claim of
2 fraudulent inducement asserts that a misrepresentation of
3 facts outside the agreement or other wrongful conduct
4 induced a party to enter into the agreement.

09:28:54 5 There can be no recovery for fraud in the
6 inducement when the allegedly fraudulent statement
7 contradicts the unambiguous terms of the final written
8 contract. As a matter of law, then, a party cannot
9 justifiably rely on a prior statement that contradicts
09:29:12 10 the unambiguous terms in a written contract.

11 To prove fraudulent inducement, then,
12 Hodell must demonstrate the same elements necessary to
13 prove an action for fraud. So Hodell must prove by clear
14 and convincing evidence each of the following elements:

09:29:30 15 1. A false representation of fact was made
16 with knowledge of its falsity or with utter disregard and
17 recklessness about its falsity that knowledge may be
18 concluded and found.

19 And, two, the representation was material
09:29:51 20 to the transaction.

21 3. The representation was made with the
22 intent of misleading Hodell into relying upon it.

23 And, four, Hodell was justified in relying
24 on the representation and did, in fact, so rely.

09:30:08 25 And, five, Hodell was injured, and the

1 injury was proximately caused by its reliance on the
2 representation.

3 The representation must be material; that
4 is, it must be important, necessary, or having influence
09:30:27 5 in the transaction. It must also be so substantial and
6 important that it influenced the person to whom it was
7 made or from whom -- that's not it -- to whom it was
8 made.

9 A representation is false when it is not
09:30:50 10 substantially true. The truth or falsity of a
11 representation depends on the natural and obvious
12 meanings of the words, taking into consideration all of
13 the surrounding circumstances.

14 A person knows a representation is false
09:31:07 15 when he is aware that it is not substantially true.

16 A representation is made with utter
17 disregard and recklessness when the person who makes the
18 representation is completely careless or indifferent to
19 the consequences or the risk that the representation will
09:31:25 20 cause the person to whom it is made to do or not to do
21 certain things.

22 Recklessly means wantonly, with
23 indifference to consequences. If a person makes a
24 representation without knowing whether it is true or not,
09:31:42 25 or makes it without regard to its truth or falsity, or to

1 its possible consequences, he may be found to have made
2 the representation recklessly.

3 If a person has no knowledge of a fact but
4 asserted it as true when it was false, you may find that
09:32:00 5 he made the representation with utter disregard and
6 recklessness.

7 A representation recklessly made without
8 knowledge of the truth is the same as a false
9 representation knowingly made.

09:32:14 10 A person intends to mislead another to rely
11 on a representation when it is his purpose to mislead. A
12 person's intent is known only to himself, unless he
13 expresses it to others or indicates it by his conduct.

14 Intent is determined from the way in which
09:32:33 15 the representation is made, the means used, and all the
16 facts and circumstances in evidence.

17 Rarely is the subjective intent of any
18 party alleged to have committed fraud provable by direct
19 evidence. Fraud must be measured by objective standards.
09:32:51 20 The existence of intent to mislead or defraud must be
21 considered under the totality of all the circumstances
22 before you.

23 There is a justifiable reliance in a
24 representation when a person of ordinary care would rely
09:33:06 25 on it under the same or similar circumstances.

1 Hodell must be directly damaged by the
2 reliance on the representation. This means that the
3 damage was caused by the representations in a natural and
4 continuous sequence and without which the damage would
09:33:23 5 not have occurred.

6 Where an original act is wrongful and in a
7 natural and continuous sequence produces a result which
8 would not have taken place without the act, proximate
9 cause is established. And the fact that some other act
09:33:41 10 unites with the original act does not relieve the initial
11 offender from liability. Even where an act is not the
12 sole cause of the injury, that act can still be
13 sufficient to satisfy the element of proximate cause so
14 long as it put in motion the sequence of events that lead
09:33:58 15 to the injury.

16 Remote cause or condition, a person is not
17 responsible for damage to another if his or her act is a
18 remote cause and not a proximate cause. A cause is
19 remote when the result could not have been reasonably
09:34:14 20 foreseen or anticipated as being the likely cause of any
21 damage.

22 Under Ohio law, certain types of
23 representations cannot constitute a misrepresentation.

24 Future act. A misrepresentation must also
09:34:28 25 relate to an existing fact. Ordinarily, a statement

1 about a future act and what a person intends to do in the
2 future does not relate to an existing fact and cannot be
3 the basis of a claim for misrepresentation unless the
4 person who made the statement did so with a present
09:34:47 5 intent to act contrary to the statement.

6 Opinions. Expressions of opinions, even
7 though false, are not a basis for misrepresentation.

8 Puffing. Boastful assertions or highly
9 exaggerated descriptions or claims are puffing or
09:35:06 10 bragging and are not false representations. Sometimes it
11 is called dealer's talk or trade talk.

12 So if you find that Hodell has proved by
13 clear and convincing evidence all of the elements of
14 fraud against one or both of the Defendants, your verdict
09:35:22 15 would then be in favor of Hodell and you would then
16 consider the subject or the issue of damages.

17 However, if you find that Hodell has failed
18 to prove by clear and convincing evidence any one or more
19 of the elements of fraud against one or both of the
09:35:38 20 Defendants, your verdict must be for that Defendant or
21 those Defendants against whom one or more of the elements
22 was not proven and you would enter the verdict
23 accordingly, and you would not consider the subject of
24 damages.

09:35:51 25 Now, if you find in favor of Hodell on its

1 claim of fraudulent inducement as to either/or both of
2 the Defendants, Hodell is entitled to recover, as
3 compensatory damages, such damages as will fairly
4 compensate Hodell for the wrong suffered; that is, the
09:36:09 5 damages sustained by reasons of the fraud or deceit and
6 which have naturally and proximately resulted therefrom.

7 If you do find for Hodell, you will decide
8 from a preponderance of the evidence what amount of money
9 will reasonably compensate Hodell for the damages
09:36:27 10 directly caused by the fraudulent inducement.

11 In the event that you are deliberating on
12 the subject of damages, you may consider the evidence, if
13 any, related to the subject of Hodell's increased
14 overhead expense, out-of-pocket expenses, and/or training
09:36:44 15 expenses.

16 You are not to consider any other damages,
17 including potential attorney fees, costs, or punitive
18 damages. And then punitive damages are really those
19 damages awarded to punish a party, but you're not to
09:36:58 20 consider either potential attorneys' fees, costs, or
21 punitive damages.

22 The issue of attorney fees, costs, and/or
23 punitive damages are not subjects for the jury to
24 consider.

09:37:10 25 Now, the general rule regarding damages in

1 a civil case is that they must be proven with certainty,
2 but the amount may be reasonably estimated.

3 Damages are not rendered uncertain because
4 they cannot be calculated with exact -- with absolute
09:37:26 5 exactness.

6 It is sufficient if a reasonable basis of
7 computation is afforded, although the result may only be
8 an approximate.

9 In other words, damages need not be
09:37:37 10 calculated to a mathematical certainty.

11 Now, SAP claims that Hodell failed to
12 mitigate its damages. If SAP proves by a preponderance
13 of the evidence that Hodell did not make reasonable
14 efforts under the facts and circumstances in evidence to
09:37:51 15 avoid loss or lessen damages caused by SAP's
16 misrepresentation, you should not allow damages that
17 could have been avoided by reasonable efforts to avoid
18 any loss.

19 Hodell, however, is not required to take
09:38:05 20 measures that would involve undue risk, burden, or
21 humiliation.

22 Now, what is a preponderance of the
23 evidence in comparison to clear and convincing evidence?
24 Preponderance of the evidence is the greater weight of
09:38:19 25 the evidence; that is, the evidence that you believe

1 because it outweighs or overbalances in your minds the
2 evidence that's opposed to it.

3 Preponderance means evidence that is more
4 probable, more persuasive, or of a greater probative
09:38:32 5 value. Remember, it is the quality of the evidence that
6 must be weighed, and quality is not necessarily identical
7 to quantity or the greater number of witnesses or
8 exhibits presented during the trial.

9 In determining whether any issue has been
09:38:47 10 proved by a preponderance of the evidence, you should
11 consider all of the evidence, regardless of who produced
12 it. If the weight of the evidence on any issue is
13 equally balanced or if you are unable to determine which
14 side of the issue has -- which side of an issue has the
09:39:04 15 preponderance, the party who has the burden of proof has
16 not then established that issue by a preponderance of the
17 evidence.

18 Now, I do know that evidence in lawsuits is
19 not always clear and unquestionable, so I don't expect
09:39:17 20 you to decide the issues' uncertainties. On the other
21 hand, you must not be satisfied with mere possibilities.
22 Injustice could easily result if you awarded a verdict or
23 a decision to a party who's only possibly entitled to it.

24 Your answers to the issues on damages must
09:39:34 25 be based on probability, what is probably the truth, what

1 is more likely the truth than not. Another way of
2 expressing that function is that you are to decide those
3 issues according to the preponderance of the evidence,
4 regardless of who produced it.

09:39:51 5 Now, the fact that I have instructed you on
6 the proper measure of damages should not be considered as
7 indicating any view of mine as to which party is entitled
8 to a verdict in the case.

9 The instructions as to the measure of
09:40:04 10 damages are given for your guidance only in the event you
11 should find in favor of the Plaintiff from clear and
12 convincing evidence in the case in accordance with all
13 the other instructions.

14 Okay. Now, that concludes my general
09:40:17 15 instructions, and I'm going to turn the case over to the
16 lawyers at this point, and then when they're finished,
17 I'll give my concluding comments about how to conduct
18 yourself in the jury room and other such procedural
19 matters.

09:40:30 20 Now, final arguments. I mentioned to you
21 in opening statements, the lawyers stood before you and
22 gave you an outline or an overview of what that lawyer or
23 those lawyers thought the evidence was going to show
24 during the course of the trial.

09:40:47 25 Now in final arguments you've heard all the

1 evidence. They get to stand before you and go over what
2 they think the evidence was as it was presented during
3 the course of the trial.

4 Now, sometimes, though, none of these
09:41:02 5 lawyers, let me tell you honestly, none of them would
6 ever intentionally try to mislead you. So if they say
7 something that they claim is in the evidence, and you
8 don't remember it, you call on your good judgment as to
9 what the testimony and other evidence actually was.

09:41:20 10 You know this, these lawyers have been with
11 this case for a long time. They've talked to witnesses
12 outside the courtroom, they've read depositions, they've
13 read documents, and so if they say something that you
14 don't recall from the evidence, it may be just a
09:41:32 15 misstatement based on something that they may have heard
16 or thought outside the courtroom. Or on the other hand,
17 your memory may be short on it. So you just, at the end
18 of the day, you have to decide what you heard in court.
19 Don't necessarily rely on what any lawyer says.

09:41:47 20 Second thing is is in final arguments, the
21 lawyers are permitted to, in an effort to persuade you to
22 their position, draw what they think are reasonable
23 inferences that can be drawn from the evidence.

24 Now, you can accept what the lawyer says as
09:42:06 25 a reasonable inference or reject them. That's a decision

1 you have to make. Ultimately, any reasonable inference
2 to be drawn from the evidence has to be drawn by you, the
3 jury.

4 The lawyers are permitted to argue before
09:42:19 5 you, the jury, in an effort to assist you on
6 understanding the evidence and obviously in an effort to
7 persuade you to their position.

8 What any lawyer says simply is not
9 evidence. All right? So don't substitute what a lawyer
09:42:32 10 says for the evidence for what you found to be the
11 testimony or other evidence during the course of the
12 trial.

13 Because the Plaintiff has the burden of
14 proof, the law says the Plaintiff must proceed first and
09:42:43 15 give their opening argument. Then when they're
16 concluded, the Defense has a chance to give their
17 argument. And then when they're finished, because the
18 Plaintiff has the burden of proof, they get a chance to
19 finish and give the final argument to you, after which, I
09:42:58 20 will give you your final instructions and the case will
21 be given to you for your consideration.

22 So I'll let the Plaintiff take a couple
23 minutes to get set and fixed up if they want to do that.
24 You can stand up and stretch and when they're ready,
09:43:12 25 we'll get going.

1 Who is going first for you? All right.

2 Sharon, how long do you think?

3 MS. LUARDE: About an hour and a half.

4 THE COURT: Could you tell me during your
09:43:26 5 presentation a good time to break if you want, or if you
6 don't want to break, we'll go the whole time.

7 MS. LUARDE: That's fine. I'll be happy to
8 do that.

9 THE COURT: It's your judgment.

09:43:34 10 MS. LUARDE: Okay. Is it okay if I run to
11 the restroom real quick?

12 THE COURT: Sure -- no.

13 (Laughter)

14 MS. LUARDE: Good morning.

09:48:47 15 THE JURORS: Good morning.

16 MS. LUARDE: I want to thank all of you for
17 your time the last couple of weeks. I know learning
18 about DI API and two-tier architecture is just a really
19 interesting topic. So thank you for that.

09:49:00 20 We're here today, you've heard a lot of
21 evidence during this trial, and we're here today for one
22 clear reason, and that reason is was Hodell lied to about
23 Business One's capabilities? And based on everything
24 you've seen, the answer to that is yes. They were
09:49:31 25 absolutely lied to during the sales process and even

1 after the sales process.

2 And, in fact, there really can't be much of
3 a dispute about this. We know Dan Kraus, and you saw Dan
4 Kraus. He was their vice president in charge of sales,
09:49:48 5 and he came in to testify. And during his testimony, Dan
6 Kraus actually said that he didn't know about any
7 limitations with regard to Business One and its user
8 size. He wasn't aware of any whatsoever.

9 And Dan Kraus, as the vice president of
09:50:07 10 sales, you can draw an inference from that that he wasn't
11 telling anyone that sold Business One, knew of any
12 limitations. He wasn't telling people that they knew of
13 any limitations because he didn't know of any
14 limitations.

09:50:21 15 We also know that Ralf Mehnert-Meland said
16 that the product was oversold. We also know that Dirk
17 Boessmann, who was the developer at SAP, said that
18 Business One would fail due to overselling. We also know
19 that Udi Ziv, you've all seen Exhibit 69 and you get to
09:50:47 20 see it again, Udi Ziv, let's talk for just a minute about
21 Udi Ziv.

22 Udi Ziv was the head of development for
23 Business One in Israel. Udi Ziv didn't report to the
24 president of the company. His testimony was that he
09:51:05 25 reported directly to the Board of Directors. Udi Ziv was

1 identified by Geoff Ashley as the guy who knew about
2 Business One. Udi Ziv was in charge of the development
3 team. He knew exactly what Business One's capabilities
4 were and were not.

09:51:23 5 And Udi Ziv -- Kim, if you could pull up
6 Exhibit 69, and if you could scroll down, Kim. And
7 again, Kim. Blow up this portion. Udi Ziv wrote, "I
8 honestly do not know what to tell you. Someone has sold
9 to the wrong customer, which is way above any sane B1
09:52:11 10 Sweet Spot. 120 users."

11 This is what the head of the development
12 team for Business One is writing, and he uses "WAY" in
13 all caps, and he has three exclamation points, and he's
14 very clear that 120 users is way above what Business One
09:52:34 15 can handle.

16 And I submit to you, based on what we've
17 heard, SAP knew this way back in 2004 and 2003 when
18 Hodell-Natco was actually looking at purchasing this
19 product.

09:52:48 20 The development team knew it. Udi Ziv knew
21 the minute he saw the user count, he knew it. And that's
22 why he sent this e-mail.

23 We also have another document going to this
24 exact point, and that's from Geoff Ashley. And Geoff
09:53:08 25 Ashley, you recall, he was on this screen and appeared by

1 remote video, and Geoff Ashley actually authored an
2 e-mail -- and, Kim, if you can pull it up, it's Exhibit
3 180.

4 If you look at this document, dated April
09:53:34 5 16th, 2007, Geoff Ashley, he's writing to Michael
6 Sotnick, and Michael Sotnick is pretty high up in the
7 corporation, and Ralf Mehnert-Meland, who you met here
8 during the trial.

9 Geoff Ashley writes, down here, "There were
09:53:53 10 many discussions with Dan Lowery and others within his
11 organization stressing that this, quote, unquote,
12 opportunity was suspect from day one."

13 What does he mean by that? It's pretty
14 clear to me. They knew from the get-go, they knew from
09:54:12 15 the very moment that Hodell-Natco identified their needs,
16 that Business One would never support Hodell-Natco and
17 their ERP needs. It never would work. And they knew it.
18 SAP knew it.

19 You know, part of why we're here today is
09:54:47 20 due to the overselling of the product, and I wanted to
21 put these documents right in front of you before I talked
22 a little bit about Hodell-Natco. And I want to spend
23 just a second talking about Hodell and talking about Otto
24 and Kevin Reidl and Hodell-Natco itself.

09:55:02 25 As you learned during the testimony,

1 Hodell-Natco is a small, family-owned business, located
2 here in Cleveland, Ohio. And they're a warehouse
3 distribution facility. You know all this. They ship
4 fasteners and parts.

09:55:19 5 And you saw Otto and Kevin on the stand.
6 Otto and Kevin, in my opinion, are intelligent,
7 articulate, savvy businessmen. They're sincere and
8 they're honest and they're hard-working, and there is no
9 way Otto Reidl or Kevin Reidl would invest close to a
09:55:40 10 million dollars in a computer system that would never
11 work.

12 They wouldn't do it.

13 And to believe what SAP is telling you,
14 that Otto Reidl didn't conduct enough of an
09:55:57 15 investigation, that they just were making things up --
16 you have to discount everything that these two gentlemen
17 have told you.

18 Instead, you have to believe current SAP
19 employees who were trotted up here one after another on
09:56:22 20 the stand. And I'll get to this later about some of the
21 inconsistencies during their own testimony here at trial.

22 Kim, if you could, I'd like to put up
23 Exhibit 314, please. So Hodell-Natco, back in 2003,
24 decided that they needed a new ERP system. And why did
09:57:00 25 they need it? Well, they had been using the FACTS system

1 for almost 14 years, which is a really long time for a
2 computer system. And they needed a system that would
3 grow with their company. And I think you've heard the
4 testimony, I thought it came out fairly clear that
09:57:17 5 Hodel-Natco grew through acquisition, that they would
6 actually buy their competitors. They would absorb them
7 into their family, and they would continue to have a
8 growth rate of 13 or 14% annually per year.

9 And so the FACTS system was out-of-date and
09:57:35 10 it simply didn't work for them anymore, and so Otto Reidl
11 actually undertook a search to find a new ERP system.
12 And so Otto and Kevin got together and put their heads
13 together, agreed that they needed a new system, and they
14 came up with certain parameters for that system.

09:57:55 15 You know, before we invest this money, what
16 does the system have to do? What do we need it to do?

17 Number one, scalability. And we've heard a
18 lot about scalability. They needed a system that would
19 grow. They knew that they needed 120 licenses initially.
09:58:15 20 They knew that they needed to grow up to three to 500
21 users, and they knew this because they had plans to grow
22 through acquisition.

23 Historically they have done that, and that
24 was their future plan. They were very clear on this
09:58:31 25 need.

1 They also needed a system that could be
2 customized. They needed a system that could support the
3 fastener industry. They needed a system that could
4 handle a large number of SKUs, a large number of
09:58:47 5 inventory parts.

6 And we heard testimony about the inventory
7 parts. There are about 40,000 inventory parts, but then
8 when you take a bulk package of bolts or nuts and you put
9 it into different size packages, it creates another SKU.

09:59:04 10 So they had about 40,000 inventory parts,
11 and about 150,000 SKUs. And the computer system had to
12 be large enough to handle that.

13 The system also had to be able to be
14 efficient and more efficient than what they had under
09:59:22 15 FACTS because otherwise, why would you switch? Why would
16 you move from a system that was working to a system that
17 didn't work? You wanted to build an efficiency. And
18 that was really important to them. They wanted to
19 increase their productivity, increase their efficiency
09:59:40 20 rate, and have a better bottom line. I mean, that's what
21 companies do.

22 They were also really interested in SAP
23 because SAP holds itself out as one of the world leaders
24 in ERP software systems. That's what they say. "We're
10:00:02 25 the best." That's their claim.

1 And, in fact, if you look at some of their
2 recent annual statements, they have about 16,000
3 employees worldwide. SAP is a really big company, and
4 with all that personnel, you would believe that you would
10:00:20 5 have great support. And that was important to Hodell.
6 That was important to Kevin. That was important to Otto.
7 They wanted to have a system that would work for them.
8 That was key for them.

9 What they didn't know is even though they
10:00:43 10 had all of this criteria and ultimately selected Business
11 One, what they didn't know -- and these are Geoff
12 Ashley's words, Geoff Ashley's testimony -- Business One
13 was not ready for prime time. It just wasn't.

14 They knew it. Geoff Ashley knew it. We
10:01:01 15 saw his last e-mail. Udi Ziv knew it. Dan Kraus knew
16 it. They knew it.

17 So Otto and Kevin determined the parameters
18 they needed for the purchase of a new system. And Otto
19 actually conducted due diligence. You heard his
10:01:23 20 testimony. He didn't just latch on to the first thing he
21 came across. He took a trip to Chicago, and he looked at
22 Profit 21. He also looked at a program called Take
23 Stock, and he looked at a variety of different ERP
24 systems before he landed on Business One.

10:01:41 25 And, in fact, he came across Business One

1 when he was here in Cleveland. He went to the trade
2 show, and he, you know, walked around, looked at
3 different booths, met with different people, gave them
4 some information, and lo and behold, they reached out to
10:02:02 5 him.

6 And who reached out to him? It was
7 American Express. And AmEx has their own Business One
8 Edition. And that was his first contact with a channel
9 partner about Business One.

10:02:16 10 And actually, Kim, we'll switch to Exhibit
11 617. And let's take a close look at this document. Here
12 we are on Page 1, October 1st, 2003, and it's from
13 Heather Devereaux, and she's sending documents to Otto.
14 The AmEx Edition. And, Kim, if you could flip to the
10:02:48 15 next page.

16 And here we are, the second page, the first
17 page of the American Express Edition document, and this
18 document down here in the corner -- Kim, if you can blow
19 that up for me -- is an SAP channel partner logo. Otto
10:03:14 20 read every bit of this information. Kim, if you could
21 scroll to the next page.

22 He read everything on this page. And the
23 next page, Kim. He read about the financing program, and
24 he read this about, "New solutions for small and midsize
10:03:42 25 businesses."

1 And, Kim, if you could, I believe on the
2 next page. And all of this information was incredibly
3 important to Mr. Reidl in making his decision. And what
4 really caught his eye was this: "The SAP Business One
10:04:09 5 Solution effectively supports companies with as few as
6 ten and as many as several hundred employees."

7 That was critical for Hodell. Why?
8 Because they were growing. They needed a system that
9 could grow.

10:04:33 10 They also met with Ms. Vitantonio, and you
11 saw Ms. Vitantonio testify. She actually is currently
12 working for SAP, but at the time, she worked at AmEx, and
13 she was the channel partner for SAP for the AmEx Edition.
14 And she testified that she met with Otto Reidl and had a
10:04:57 15 couple phone calls with Otto Reidl, and you'll recall,
16 she had very detailed notes where they had what was
17 called a discovery meeting, and during that meeting, she
18 took down a lot of information about the database size,
19 the number of SKUs, and other information that was
10:05:14 20 relevant to the decision to put together a proposal for
21 Business One.

22 Ms. Vitantonio, because Business One was
23 new to the United States, she actually had to work pretty
24 closely with SAP in order to make sure that the product
10:05:35 25 would work for Hodell. So she worked with her technical

1 people who talked to SAP's technical people, and in fact
2 they concluded, based on the information they had, that
3 Business One would be a fit.

4 You also recall, again, because of the
10:05:55 5 importance of scalability, that Otto Reidl testified that
6 he specifically asked about whether this system was
7 scalable and whether it would accommodate the number of
8 users that Hodelle would require. That was important to
9 him. That was important to their company. He wasn't
10:06:19 10 going to throw money away on something that wouldn't
11 work. That's not going to happen.

12 Ms. Vitantonio, her notes didn't reflect
13 300, but what she did say in her testimony is that she
14 was sure she probably did talk about scalability with
10:06:37 15 Otto, "Yeah, I talked to him about scalability. I talked
16 to him about growth."

17 What we do know then is that a proposal was
18 submitted, and the proposal was eventually turned down
19 because of the cost factor.

10:07:04 20 What SAP is claiming with this
21 document -- and, Kim, if you could go back to 314. In
22 314, we have the SAP Business One brief. And again, this
23 is another piece of documentation that Mr. Reidl
24 received, and both Kevin and Otto reviewed this material.
10:07:42 25 And they reviewed every single page in the document.

1 And, Kim, if you could flip.

2 And here, on Page 2, we see, "SAP Business
3 One provides robust and fully integrated financial and
4 sales management capabilities, and it gives managers
10:08:06 5 on-demand access to critical real-time information for
6 better decision-making. The solution helps emerging
7 businesses, from those with 10 to several hundred
8 employees, to streamline their operational and managerial
9 processes."

10:08:20 10 Again, another document, similar to the
11 AmEx document, the content of which Otto testified, was
12 supported by Ms. Vitantonio, stating that Business One
13 could support and accommodate their growth needs.

14 SAP's going to tell you these documents are
10:08:44 15 just puffery, they're meaningless, they don't mean
16 anything, but that's not the case. This document is
17 extremely specific about the number of employees. Even
18 if you buy into their argument that employees doesn't
19 mean users, it says "10 to several hundred employees."

10:09:08 20 Several hundred in my book is at least 300. Hodell-Natco
21 was below 300 employees at the time they purchased
22 Business One.

23 And you'll recall the testimony of Brooks
24 Hilliard. Brooks Hilliard was up on the stand, and he
10:09:24 25 was the rebuttal witness to Helmuth Guembel. And Brooks

1 Hilliard testified that he would expect 70% of employees
2 to be users on a system for a warehouse, a warehousing
3 company, distribution facility, like Hodel.

4 So 70% of 300, if my math is right, is 210
10:09:49 5 users. So their own witness, based on this document and
6 based on 300 employees, would anticipate Business One
7 would accommodate at least 210 users. We only wanted 120
8 initially.

9 In addition to this, we know these
10:10:23 10 statements aren't true for a lot of reasons. I want to
11 take just one second before I go on to that to talk about
12 this user/employee distinction. The early documents
13 prepared by SAP refer only to employees. They don't
14 refer to number of users.

10:10:46 15 And I scratched my head. That doesn't make
16 any sense to me, and it doesn't make sense because if
17 you're buying user licenses for a software system, it
18 really doesn't matter how many employees you have. What
19 matters, how many users can that system accommodate, how
10:11:06 20 many users can get on, log on on a day-to-day basis?

21 It doesn't make sense to talk about it in
22 the context of number of employees. What matters are the
23 number of users. And guess what? You, when these
24 documents go back with you to the jury room, not one of
10:11:23 25 them mentions the number of users. They just say

1 "Employees." And it's pretty -- a pretty natural
2 assumption that when you're buying and purchasing
3 computer software for users, that you would think that
4 must be what that means because the number of employees
10:11:48 5 really, it's kind of irrelevant to the decision. It's
6 the number of users that really matters.

7 And here's a question, why did SAP
8 advertise things in this way? Honestly, I think it's
9 because they didn't know what they were doing when they
10:12:22 10 brought the product to the U.S. market. This product was
11 new in 2003. It had only been sold in Europe, it was
12 developed in Israel, and we heard testimony that the
13 product had issues shifting and being localized from
14 Europe to the United States.

10:12:43 15 It's pretty clear that SAP, their
16 literature at least, was all over the board at this point
17 in time. And I'm going to show you some examples of
18 that.

19 Kim, if you could put up Exhibit -- we have
10:13:04 20 Exhibit 316. If you could pull up to Page 5 as another
21 example. Here we have, "Whether you have 5 employees or
22 500." Well, that's different than what was in the
23 earlier document. Now they're saying up to 500 users.

24 So under Brooks Hilliard's, you know, 70%
10:13:32 25 theory, stretching my mind on math here, I think that

1 equates to 350 users. So there's inconsistencies in the
2 literature. Why? Because SAP didn't know what they were
3 doing. In the United States, they didn't know what they
4 were doing.

10:13:53 5 Udi Ziv knew. Udi Ziv, the head of
6 development for SAP in Israel, he knew. The development
7 team knew this would never work. Dirk Boessmann knew.
8 They knew this system could never accommodate the number
9 of users that Hodell needed.

10:14:10 10 Interestingly, Penny Vitantonio,
11 inconsistent with these documents, testified that
12 Business One could support 100 users. Dan Kraus, the VP
13 of sales for SAP who sat up there, said he didn't know of
14 any limitations. He didn't know of any. Ralf
10:14:42 15 Mehnert-Meland, he also came in and testified, he sat up
16 on that stand, "Oh, 50, 50 was the number of concurrent
17 users. It was always 50."

18 They didn't know what they were doing. The
19 sales force didn't know what they were doing. What they
10:14:59 20 did know is they wanted to sell the product. They wanted
21 to get the product out in the market. They wanted to
22 make money. That's what they wanted to do.

23 But these salespeople here in the United
24 States, they were just wrong. And here's how we know.
10:15:21 25 Internally, SAP documents that pre-date the go-live date

1 tell a different story than what we just looked at.

2 Kim, if we could put 119.24 up, please.

3 Here we have an SAP document, and, Kim, I believe this is

4 an SAP AG document dated 2006. SAP AG, this is an

10:15:56 5 internal document, not shared with consumers, not shared

6 with Hodell. They never saw this document, they never

7 received this document. Here's what they say: "When

8 might an opportunity be too large for Business One?"

9 Here are the red flags. A red flag. "Will the number of

10:16:22 10 users exceed 30?" Thirty. That's what they're saying.

11 So here we have the salespeople all over

12 the board, we have internal documents in 2006, well

13 before the go-live date, saying that number is 30. SAP

14 knew this. They just didn't tell Hodell.

10:16:50 15 Let's look at another document, 129.8.

16 Here we go. "While SAP Business One has many satisfied

17 larger customers, it is ideally suited for companies with

18 10 to 100 employees. SAP Business One serves companies

19 in many industries, but fits best for companies in

10:17:21 20 retail, wholesale, basic manufacturing, and professional

21 services. SAP Business One is optimized for performance

22 with up to 50 concurrent users."

23 50. Far less than 120. Far less than 300.

24 SAP knew this. But they didn't tell

10:17:53 25 Hodell. They just wanted to make the sale. They just

1 wanted to make the sale. And why was Hodell important?
2 Hodell was important to SAP because Hodell is one of the
3 leaders in the fastener distribution industry. They were
4 developing an In-Flight program -- actually, IBIS was
10:18:15 5 developing an In-Flight program that was going to be used
6 in conjunction with Business One, and that program would
7 give SAP the ability to sell the combination of Business
8 One and In-Flight to other companies like Hodell.

9 And they were going to use Hodell as a
10:18:35 10 recommendation. That's why Hodell was important, and
11 that's why this sale was pushed.

12 Kim, if we could just look at, I just want
13 to look at the 435.2. This is also a 2006 document used
14 by SAP. This is an internal document. Again, actually,
10:19:09 15 I think this represents a program that people can plug
16 information in on their system, and it will generate some
17 information. What we do know is the program, number two,
18 question number two, "Number of employees at prospect."
19 150 plus, no fit.

10:19:30 20 The logic down at the bottom, no fit, no
21 go. SAP knew this.

22 And at the same time, on Page -- Kim,
23 there's a page for users planned. They're also saying
24 "Number of users planned, 76 plus, no fit." These are
10:20:13 25 SAP's own documents, sizing Business One for customers.

1 If these are the numbers you come up with, Business One
2 does not fit, it does not work. And no one told Hodell.

3 At the same time in Exhibit 428, and we
4 just saw "76 plus users, no fit." But at the same time
10:20:39 5 in 2006, marketing literature that they're giving to
6 their channel partners -- and if you could turn to the
7 next page, Kim -- says, "You can have up to 200 employees
8 and 100 users." That's completely different from their
9 own online qualification tool and they're both 2006
10:20:59 10 documents.

11 They didn't know what they were doing. But
12 Udi Ziv knew. The development team knew. And, in fact,
13 multiple SAP employees knew that the sale to Hodell was a
14 mistake, and that they made a mistake, and they knew that
10:21:33 15 the product was oversold.

16 One of the people I want to talk about now,
17 how do we know this is just completely wrong? We know
18 because Helmuth Guembel, who was our expert, got up on
19 the stand and he testified that the architecture of
10:21:54 20 Business One would never accommodate the number of users
21 Hodell needed, and that SAP knew this very early on.
22 They knew it well before the product was oversold to
23 Hodell-Natco.

24 And Helmuth Guembel is a really interesting
10:22:17 25 man. Helmuth Guembel, you'll recall, testified that he

1 had consulted with SAP over a period of years, and, in
2 fact, SAP had paid him over that time period almost a
3 million dollars for consulting work. He also testified
4 that in order to serve as an expert in this case, he had
10:22:42 5 to stop taking consulting work from SAP.

6 He also, unlike some of the other experts
7 in this case, had authored a paper in 2006, before the
8 go-live date at Hodell. He authored a paper in 2006 that
9 was published in a technical paper, a technical magazine,
10:23:10 10 setting forth the limitations of Business One that he
11 explained here today. It was well-known to Business One
12 that there were problems with the architecture and that
13 it would never accommodate the number of users that
14 Hodell needed.

10:23:25 15 One of the interesting parts of the
16 testimony, I thought, was when Helmuth actually looked at
17 the IBM paper that SAP was kind of waving around as the
18 testing for the system. "This paper shows the testing
19 for our system. We test it. We know it can accommodate
10:23:47 20 the users."

21 But there was a mathematical calculation in
22 that paper and Helmuth looked at that calculation and he
23 performed that math, he did the math, and his testimony
24 up on the stand was based on IBM's paper, Business One
10:24:02 25 could only accommodate 58 concurrent users. That was his

1 testimony. We didn't see that paper after that.

2 Brooks Hilliard, he didn't say anything
3 about that IBM paper because he couldn't, because Helmuth
4 was right. That IBM paper, doing that math? 58
10:24:24 5 concurrent users. That was Helmuth's testimony.

6 You'll also recall Eddy Neveux and Eddy's
7 testimony, and I want to put up a chart.

8 And you'll recall that when Mr. Neveux was
9 up on the stand, I put this chart up and asked him to
10:25:03 10 confirm for me the testing that was done by SAP in
11 Israel. And this is the testing that related to the
12 capacity of Business One and what Business One could
13 actually handle.

14 And Eddy confirmed for me that the testing
10:25:18 15 in Israel for the number of users at the high end was 30.
16 The number of items, 60,000. The number of business
17 partners, customers, 16,000. And you can see what
18 they're testing on this chart.

19 Over here, here's what Hodell-Natco had in
10:25:51 20 place. They were starting out with 120 users, growing to
21 three. That's ten times this number.

22 The number of items, almost three times.
23 Many, many more business partners. They knew, SAP knew
24 Hodell-Natco would never work on Business One based on
10:26:25 25 their own testing, based on their IBM testing. They knew

1 this.

2 So what else has SAP done? SAP brought
3 Brooks Hilliard in here to defeat our argument based on
4 their own testing, based on the IBM tests, based on
10:26:57 5 Helmuth Guembel, all of whom say Business One is never
6 going to work. SAP ran a list of companies, and I
7 printed it off here. This is Defendant's Exhibit 700.
8 And this document shows, well, I think what's telling is
9 what it doesn't show. It may show on here, the testimony
10:27:33 10 was and Helmuth Guembel was on the stand and Paul
11 Killingsworth was on the stand, this document does not
12 show how many add-ons there were, how many installations
13 there were at each company, did they just have one
14 system, did they have multiple systems? It doesn't show
10:27:52 15 if they had one add-on, no add-ons, multiple add-ons. It
16 doesn't show if they're using this for anything more than
17 accounting back-office functions. It doesn't show
18 anything on this document, other than number of user
19 licenses.

10:28:08 20 That's it. That's all this document shows.
21 But it doesn't tell you that they are operating it for
22 anything -- it doesn't even tell you if all the users are
23 using it. This document doesn't tell you anything. It's
24 completely meaningless. And this is what Brooks Hilliard
10:28:24 25 says proves that Business One could work for more

1 customers. That's what SAP is saying. This proves that
2 Business One can work for bigger customers. But if
3 that's the case, and you'll recall -- Kim, if you could
4 pull up Geoff Ashley's summary e-mail, the "stunned
5 silence" e-mail. Pardon me.

10:28:43

6 And if you could look at this, here we go.
7 Point one, this is dated April 17th, 2007. "LSi
8 commented that they originally sold this solution to
9 Hodell as something that was designed for companies of
10 250 million in revenue with up to 500 users. There was
11 stunned silence on the phone."

10:29:19

12 If SAP Business One could support Loreal as
13 it claimed, why is there stunned silence on the phone?
14 It doesn't make sense. And it's because this document is
15 incredibly misleading. It doesn't give you all the
16 information you need in order to see if this is true.
17 And SAP could have produced that information. They could
18 have told you, I'm sure, running their system, how many
19 add-ons there were, how the program was installed. They
20 could have given you that information, but they didn't.

10:29:48

10:30:07

21 They just said how many user licenses are there. That's
22 it. They don't provide any more detail or information.

23 And again, if they could support Loreal as
24 they're claiming, why can't it support Hodell? It's
25 because this document is misleading.

10:30:30

1 SAP also claims that there was testing done
2 at Hodell showing that the system actually worked, and
3 they're relying on that testing to say Business One, in
4 fact, worked for Hodell. And we'll talk a little bit
10:31:17 5 about the testimony of Hodell's employees in a minute,
6 but I want to talk about those documents for a second.

7 And, Kim, if you could pull up Exhibit 901.
8 And this testing occurred on two separate days, Gadi
9 Barnea conducted one test, and Gadi Barnea, Gadi Barnea
10:31:49 10 didn't come in to testify, but Gadi Barnea did testing on
11 one day, and states in this e-mail -- no, has a
12 breakdown, and on the next page -- Kim, I think there's a
13 chart attached. There we go. You know, we went through
14 this chart and this testing and these are the results of
10:32:16 15 testing on one given day. And the date of this was in
16 July of 2007.

17 I want you to remember that date. The
18 second test was performed by Eddy Neveux, and that was
19 Exhibit 809. And Eddy Neveux went in and performed some
10:32:45 20 testing, and this is a -- and he went there with Paul
21 Killingsworth. And this was in October of 2007. And,
22 Kim, if you could go to the next page, I believe. Right
23 here.

24 And Eddy Neveux writes down at the bottom,
10:33:13 25 he says, "The persons that typically enter sales orders

1 at the Hodell/Natco headquarters in Cleveland stated
2 about 4:00 p.m. that yesterday was a slow day as far as
3 an order entry day. Also to note, the worst performance
4 that I saw with respect to the logs was a nine-second
10:33:34 5 delay with respect to a function, entering a sales
6 order."

7 And then underneath there, he says, "There
8 were a few times visually I did see what looked like a
9 longer delay."

10:33:59 10 So SAP is basing their entire argument, or
11 part of their argument on the fact that testing was done
12 on two separate days and everything was just fine. But
13 what we do know was after these tests were performed, and
14 remember, Paul Killingsworth was there for that October
10:34:13 15 test. And if you could go to 423.6, Kim.

16 After this test was performed, Paul
17 Killingsworth writes, "They are experiencing terrible
18 performance." And he also says, "SAP Business One is not
19 designed to handle this amount of transaction volume."
10:34:46 20 That's what Paul Killingsworth is saying.

21 He's not saying "Eddy Neveux reports
22 everything's just fine. There are no issues." No, he's
23 saying they had terrible performance and Business One
24 doesn't work. That's what he's writing.

10:35:00 25 But Paul Killingsworth backed away from

1 that e-mail during his testimony. He said he was just
2 trying to get the Citrix person involved. So he had to
3 exaggerate, you know, what the performance level was
4 because he just wanted to prompt them to do what needed
10:35:19 5 to be done.

6 So Paul Killingsworth, he's like a puppet
7 on a string, and why do I say that? You'll recall when
8 my colleague, Mr. Carney, was examining
9 Mr. Killingsworth, one of his first questions was related
10:35:34 10 to representations made by channel partners. And he
11 said, "You would agree with me, wouldn't you, that your
12 channel partners have to make representations about
13 Business One and the sale of products?" Seems natural.

14 In fact, many, many of the employees
10:35:54 15 testified that in fact they did have to do that.
16 Ms. Vitantonio testified that she had to make
17 representations about Business One.

18 But Paul Killingsworth -- Kim, can you pull
19 that up -- but Paul Killingsworth, here he said, here's
10:36:17 20 the exact question and answer. He said "Well, what I
21 would suggest is that they can demonstrate what the
22 product is able to do.

23 "Question: So it's your testimony that a
24 channel partner that sells Business One cannot make any
10:36:31 25 representations about it?

1 "Answer: Yes, sir, that is my testimony.
2 They may not make a representation. Correct."

3 So SAP, who has -- who does not have its
4 own sales force and relies on channel partners to make
10:36:47 5 the sales, is saying that channel partners cannot make
6 representations about their products.

7 It just isn't believable. SAP's lawyers
8 knew it wasn't believable, and Paul Killingsworth came
9 back in and changed his testimony.

10:37:03 10 Here's the question for Mr. Kelleher. "Are
11 you telling this jury, sir, that SAP expects the
12 resellers or channel partners to be mutes?

13 "Answer: Absolutely not.

14 "Question: So you do expect that they're
10:37:19 15 going to say things about the product, right, sir?

16 "Answer: Absolutely." Puppet on a string.
17 He'll say whatever, whatever he needs to say as an SAP
18 employee.

19 We also know after this testing was done by
10:37:42 20 Gadi Barnea and Eddy Neveux that Michael Sotnick went to
21 Hodell. And Michael Sotnick is pretty high up in the
22 company, and he wrote an e-mail where he described the
23 pain that Hodell was experiencing with Business One.

24 If you bear with me one minute, I'll pull
10:38:04 25 that up for you. Exhibit 264, Kim.

1 And if you could blow that up for me. And,
2 Kim, if you could go back to the first page so we can see
3 the date.

4 THE COURT: Sharon, do you want to break
10:38:35 5 after this exhibit?

6 MS. LUARDE: Yeah, that's fine, Your Honor.

7 THE COURT: Whatever is convenient for you.

8 MS. LUARDE: This was sent November 29th,
9 2007 from Michael Sotnick to Dan Kraus after Gadi Barnea
10:38:47 10 was out there, after Eddy Neveux was out there, and this
11 is what Michael Sotnick, who's very high in the company,
12 this is what he writes. "I have been to their facility
13 and have seen firsthand the pain that they are in."

14 You're not going to write an e-mail like
10:39:09 15 that if everything is going just fine. That's not what
16 you're going to say. You're not going to say that
17 someone's in pain, that he can see the pain they are in.
18 That's because they were having severe performance issues
19 at Hodell.

10:39:30 20 THE COURT: Good? Okay.

21 All right, folks. I hate to do that, hate
22 to interrupt anybody's argument. When I was a lawyer, I
23 would struggle when they wanted to break it up but
24 there's only so much patience. What's that saying about
10:39:48 25 the mind can only bear what your seat can take?

1 Something like that? You don't know that? All right.

2 Anyways, are we ready there, young man?

3 (Jury out)

4 (Recess taken)

10:59:10 5 (Proceedings resumed in presence of the

6 jury as follows:)

7 THE COURT: All right. Be seated, folks.

8 MS. LUARDE: A couple things I just wanted
9 to fill out that we talked about before the break, one of
10:59:53 10 which related to Paul Killingsworth, who I described as,
11 you know, the puppet on the string and what Paul
12 Killingsworth is willing to do, and I want to show you a
13 couple other exhibits.

14 Could you pull out 266 for me, please?

11:00:18 15 Paul Killingsworth testified that they were trying to
16 help Hodell for willing to do what they needed to do for
17 Hodell, and they offered to thank Hodell and give them
18 some money to help them out. But in fact, if you look at
19 this document, this is a document dated May of 2009.

11:00:47 20 Paul writes to Dan Kraus, "Did SAP offer to cover the
21 costs of the development of the custom functionality?"

22 And, Kim, if you can go back a page just so
23 the jury can see what we're talking about here. 266.4,
24 probably?

11:01:10 25 And they're talking about a price tag of

1 about -- implementation for around \$700,000 for a
2 different system. Kim, again go back to 266.3. And here
3 we have Paul checking with Dan about who's going to pay
4 for this, and scroll up, Kim, to the top of that page.

11:01:35 5 And you'll see "We haven't agreed with
6 Hodell on anything. My understanding of the program that
7 was in place with Global, and no longer is, was that we
8 would cover equivalent functionality."

9 They didn't agree to pay for anything.
11:01:56 10 Then they go on to write, "I think the best thing to do
11 with these guys is to just refund their money after they
12 have decided where they are going."

13 Paul Killingsworth, they didn't agree to
14 pay for anything. It was kind of a surprise. And again,
11:02:10 15 SAP employee, he'll say what needs to be said.

16 You know, one of the things we've talked
17 about is, you know, SAP knowing that Business One
18 wouldn't work for Hodell-Natco, but not only did they
19 know and should have told their marketing people, the
11:02:27 20 people in Israel, the people on the development side,
21 should have communicated with the marketing team in the
22 United States, you know, what size will work.

23 In addition to that -- excuse me. In
24 addition to that, we know that SAP actually knew of
11:02:55 25 Hodell prior to the go-live date. And they knew of its

1 database size prior to the date they went live.

2 And, Kim, if you could put up Eddy Neveux's
3 e-mail, Exhibit 79, Kim. And I want to put in front of
4 you Exhibit 79. Exhibit 79, if you'd scroll back, Kim,
11:03:41 5 to Page; 7 and 8, go to Page 8.

6 And here we are, March 13th -- I apologize.
7 Actually it's shortly after go-live, March 13th. A year
8 before go-live, March 13th, 2006. Go-live was March 7th,
9 2007. So a year before, Eddy Neveux is -- Kim, go down
11:04:22 10 to the next document. No, you had it right. I
11 apologize. It's hard to read these e-mails on this
12 screen.

13 March 13th, 2006, one year before go-live,
14 Eddy Neveux writes, "I am happy to speak with them, but
11:04:41 15 based on the configuration they have, i.e., the volume of
16 data, this has nothing to do with the SDK. I don't have
17 an answer. I just want to get some understanding of what
18 to do."

19 Kim, can you go to Page 79.7? Down here at
11:04:57 20 the bottom. And he talks about the database size, and he
21 notes, "Based on the numbers that we received from
22 Israel," and these are the numbers I had up earlier on
23 this chart, "They're at the high end." And he's
24 recognizing that this is a problem.

11:05:24 25 And, Kim, if you could scroll up, please.

1 Actually, Kim, that's okay. Let's just switch over from
2 there, where Eddy Neveux knows the database size one year
3 before the go-live date.

4 SAP knew the database size one year before
11:05:50 5 the go-live date. And then you fast-forward one year to
6 go-live. And right after that, Udi Ziv's e-mail comes
7 out, recognizing that this database size was too high.
8 120 users is simply too much. And that's because they
9 knew Hodell-Natco's database size, the number of users
11:06:15 10 that they had, was simply too much for Business One.

11 Business One could not handle Hodell-Natco and its needs.

12 We also know, and we talked a little bit
13 about this, why SAP was so interested in Hodell-Natco,
14 and I just wanted to pull up a document to talk about
11:06:39 15 that. And that's a document involving Geoff Ashley. And
16 Geoff Ashley, as you recall, he was in charge of sales
17 here in the United States for SAP. And there are actual
18 reporting requirements to SAP on sales. And bear with me
19 just one second. I apologize for this. I'm going a
11:07:13 20 little out of order here.

21 All right. If you could pull up Exhibit
22 177. And here we have Exhibit 177. And in this
23 document, this is dated January 2nd, 2006, again SAP knew
24 all about Hodell-Natco. They knew about Hodell for a
11:07:59 25 long time. And this, again, is one year before go-live

1 date.

2 Geoff Ashley writes to Michael Sotnick.

3 He's very -- he's very proud in this e-mail. You can

4 tell that these are big wins for SAP. He's reporting

11:08:19 5 success stories to his boss and he says "We're able to

6 close our first six-figure opportunity. LSi was able to

7 close Hodell-Natco Industries for \$105,000 to SAP. This

8 was important, not only for its size, but also for the

9 fact that it was the first of what we hope will be many

11:08:39 10 new customers in the fastener microvertical. LSi created

11 a Business One vertical solution specific to this

12 industry, and we are looking to Hodell-Natco to be our

13 first happy, referenceable customer within this space."

14 Hodell-Natco was a big deal for SAP sales.

11:08:57 15 They wanted this deal because they wanted to expand on

16 this and sell In-Flight and Business One to other people

17 in the same industry as Hodell-Natco.

18 So again, we have this dichotomy. The

19 developers knowing it's never going to work, Eddy Neveux

11:09:17 20 questioning the size, questioning the testing, the

21 testing in Israel. You saw that. The testing in Israel,

22 simply not high enough, nowhere near Hodell's needs. Udi

23 Ziv, Eddy Neveux knew Hodell is outside the parameters.

24 Salespeople, though, this was sweet. They

11:09:44 25 wanted this. They wanted this deal.

1 Prior to go-live, though, SAP's going to
2 argue and one of their arguments in this case has been
3 that Hodell-Natco shouldn't have gone live. They didn't
4 perform enough stress testing on the system. And the
5 testing that was done, it was insufficient. And they
6 made a mistake when they pulled the trigger to go-live.

7 And they want to place blame on Hodell,
8 they want to place blame on LSi, and they want to push
9 the blame off on other people. But don't, don't buy into
10 these arguments. We know, Kevin Reidl was very clear on
11 this in his testimony. They did a lot of testing before
12 they went live. They did everything they were asked to
13 do. They performed load testing. They performed stress
14 testing. They put their users on the system and they did
15 what they were told to do.

16 And you recall Kevin Reidl in his testimony
17 was shown a couple of documents about where he delayed
18 the go-live date because he was concerned. He delayed
19 it. He's like, "I'm really concerned about this, but
20 you're the experts, LSi, you tell me what to do."

21 He delayed it. But based on
22 recommendations, he decided to go ahead and go live. He
23 pulled the trigger. He did what he was asked to do.

24 Jon Woodrum, he worked at LSi, and you saw
25 him on video. He was a soft-spoken man and he was very

1 heavily involved with the stress testing and the testing
2 prior to go-live. And you'll recall that he actually
3 testified in his deposition, which is what we showed you
4 here, that stress testing was actually performed.

11:11:33 5 And I want to show you a portion of his
6 deposition on the screen right now.

7 And we're going to show you a couple clips.
8 One relates to go-live and the other relates to stress
9 testing.

11:11:52 10 (Video played as follows:)

11 A. March 7th, I'm going to say, '07.

12 Q. Do you recall when Hodell did go live on Business
13 One?

14 A. Yes.

11:12:09 15 Q. And when was that?

16 A. March 7th, I'm going to say, '07. Really.

17 Q. Okay. At that time was it your personal opinion
18 that Hodell should go live at that time?

19 A. Yes.

11:12:36 20 Q. At the time, did you have any concerns or
21 reservations about Hodell going live at that time?

22 A. Manageable, yes.

23 Q. And when you say "manageable," what does that mean?

24 A. You didn't -- I didn't see the performance that we
11:13:04 25 would have liked to have seen, but with their agreement,

1 agreed it was acceptable and with all my other friends,
2 authors, and so on, if you wait until you have a hundred
3 percent, you never go live so eventually you have to pull
4 the trigger and go live. You wouldn't do it foolishly
11:13:30 5 but if you think the controls are in place, the testing,
6 the stress testing and so on, you do. But there was
7 -- you would rather see nano seconds than several seconds
8 in response time, and that's what we were seeing.

9 Q. You mentioned your experience. In your prior
11:13:52 10 experience, were there other occasions when a customer
11 went to live with an implementation that had, quote,
12 manageable issues or concerns?

13 A. I have experienced very successful implementations
14 with those I've been involved in. They work hard at
11:14:19 15 making sure everybody's in agreement and the definition
16 of what it is we're going ahead with, and what the
17 controls, primarily that the controls are in place
18 because for several years, people didn't parallel them
19 and so you want to make sure your controls are in place
11:14:38 20 when you go live."

21 (End of video).

22 MS. LUARDE: So I just wanted to break here
23 for one second with Jon Woodrum, but you can see he's
24 very clear. He thought all the concerns were manageable
11:14:50 25 concerns and he agreed with the decision to go live.

1 We were relying on LSi for that. Kevin
2 Reidl testified to that. We relied on the channel
3 partner, the highly qualified channel partner, who
4 assisted in making the decision on when to go live.
11:15:07 5 They're the experts. We relied on them.

6 One of the other issues brought up by SAP
7 is this notion of parallel testing where you actually
8 have to run your Legacy System, your old system,
9 alongside the new system. And that's something that
11:15:25 10 hasn't been done in the industry for a long time. And,
11 in fact, Jon Woodrum, I have a very short clip where he
12 testifies to that, that people just don't parallel test
13 during the implementation phase any more.

14 (Video played as follows:)

11:15:36 15 Q. And what do you mean by parallel?

16 A. Trying to run both your old system and the new
17 system a hundred percent on same documents, same cash
18 receipts, all those things. Something's got to give, and
19 usually the new system gives, and you revert to the one
11:15:57 20 you know best. So for many years, 15 or more years, I
21 have not seen a parallel system run in sophisticated
22 implementations.

23 Q. So when you say 15 years, does that mean starting
24 in the late nineties?

11:16:15 25 A. My first implementation with LSi, there was no

1 parallel. Going clear back to EBS, when online was first
2 cutting edge, we paralleled. But once it became no
3 longer cutting edge, it wasn't cost effective or
4 necessary to parallel. If you do the right checks and
11:16:42 5 balances and do your controls, you know how to balance
6 your receivables, inventory, and how documents are
7 processed, so no, a number of years.

8 Q. And just so I understand, after that point, did you
9 say that you never saw implementations where there's a
11:17:03 10 parallel system run?

11 A. Correct.

12 Q. Okay. In your opinion is that common in the
13 industry?

14 A. Yes.

11:17:15 15 (End of video)

16 MS. LUARDE: So again, we have a situation
17 where stress testing was done, load testing was
18 performed. People just don't parallel. It hasn't been
19 done, I think he said, for 15 years. That's a long time.

11:17:29 20 What we do know again, this testing was
21 performed well before signing the license agreement. We
22 know that Eddy Neveux knew the load size. We know that
23 SAP was very excited about the sale, and they were very
24 happy to have entered into this agreement in 2005. And
11:17:54 25 they were happy about that because it opened up this

1 entire new market to SAP.

2 SAP did all the right things and now we're
3 at the go-live date and what happens? Things go crazy.
4 The system doesn't work. You heard the testimony of
11:18:13 5 Kevin Reidl, Otto Reidl, Jaime Clarke, all of whom
6 testified that they could not work, they couldn't do the
7 work they needed to do, things were extremely slow, the
8 system would lock up, it would take employee time after
9 hours to input orders.

11:18:32 10 You heard Jaime Clarke testify how on the
11 FACTS system, one of the big customers were Amish
12 customers. They would get on a phone and they would be
13 able to type the order in while the customer was on the
14 phone. But under SAP Business One, they couldn't do that
11:18:48 15 anymore. They had to resort to writing things down,
16 staying late, and typing the orders in.

17 But we do know at this point in time, the
18 company reached out to SAP, and the first e-mail that I'm
19 going to show you again is Exhibit 69 with Udi Ziv. And,
11:19:19 20 Kim, if you could go back to the very start of this
21 e-mail, the first page which is -- scroll back up. And
22 blow up the bottom portion.

23 We had Dan Lowery at LSi writing to Udi,
24 and he wants to know why is it taking SAP so long to fix
11:19:37 25 the performance problem? When can he expect a fix to be

1 delivered to his company? He's losing hundreds of
2 thousands of dollars a month from lost orders, lost
3 customers, and extra employees to get workload out. "If
4 they throw the system out they will surely get legal with
5 us all."

6 Kim, can you please scroll up? And here we
7 go, if you could blow this up. Dan Kraus then writes,
8 "Udi, any help you can provide to Lowery is appreciated.
9 Dirk's team is working with both Lowery and Accellos to
10 try to find a solution. The customer is at the large end
11 of the B1 target and was sold with the understanding that
12 complete testing would be done prior to go-live."

13 And that testing was in fact done. You
14 heard Jon Woodrum. They did the testing. If you could
15 scroll back up, Kim.

16 Right here. This.

17 So this information, Udi Ziv writes to Dan
18 Kraus, Paul Killingsworth, Michael Sotnick, Dirk
19 Boessmann and Niels Stenfeldt. No one from Hodell-Natco
20 is on this e-mail, and they write, Udi writes, "I don't
21 know what to tell you. Someone has sold to the wrong
22 customer which is way above any sane B1 Sweet Spot, 120
23 users. And obviously they are experiencing severe
24 performance issues."

11:21:06 25 Udi knew, and he knew that based on this

1 testing that was done years earlier. Udi knew.

2 "The only thing we can say is that the
3 situation is beyond the normal B1 conditions. I
4 recommend that we go for a reimbursement. We debrief the
11:21:27 5 whole process that got us to having this customer in the
6 first place."

7 So what sort of testimony did you hear
8 about this from SAP? They said it was an emotional
9 response. And I'm going to play a clip from Udi Ziv, and
11:21:45 10 I want you to take a look at his demeanor and tell me
11 what you think. You can't tell me what you think, but
12 think about it.

13 (Video played as follows:)

14 Q. Okay. 69, I'm looking at your response to what you
11:22:02 15 sent to Dan Kraus, April 12th at 2:51 p.m. Were the
16 statements you made in that e-mail to Dan Kraus obvious
17 to you based upon the information that had been indicated
18 to you by Dan Kraus and Dan Lowery?

19 A. You're asking if it was obvious? I don't know
11:22:31 20 what -- I don't know what was obvious or not. I mean, I
21 can read what I wrote, but I don't know what was obvious
22 and what wasn't.

23 Q. Well, more likely than not, did you do any
24 independent investigation or research in preparation of
11:22:45 25 writing this e-mail?

1 A. I don't remember. I -- I doubt I wrote it without
2 addressing some other people in the organization because
3 these are usually things I wouldn't be dealing with
4 directly, but I don't know.

11:22:59 5 Q. More likely than not, who would you have talked to?

6 A. Most probably, at least Dirk Boessmann, who's
7 copied on this e-mail.

8 (End of video)

9 MS. LUARDE: So Udi testified first that he
11:23:15 10 consulted with Dirk Boessmann and, secondly, Udi doesn't
11 strike me as a very emotional guy. He seems pretty
12 serious and somebody that would take an e-mail like that
13 pretty seriously.

14 And, Kim, I want to put 69 back up for the
11:23:31 15 jury. And, Kim, could you go back to the e-mail portion
16 we were just looking at, 69.3, I think, Kim.

17 So this is dated April 12th from Udi Ziv,
18 and he writes this e-mail to the following people. And,
19 Kim, on 69.2, down here at the bottom, we have Dan Kraus'
11:24:16 20 response.

21 "Udi, this customer was sold in 2004 before
22 there was any announced or understood issue. We need a
23 commitment to figure out a way to get this issue solved.
24 If that doesn't work, you have my commitment to then look
11:24:32 25 at reimbursement."

1 What is Dan Kraus stating here? It was
2 sold before the salespeople in the United States knew
3 what they were doing, before there was any announced or
4 understood issue.

11:24:52 5 If you could go up to the next e-mail, Kim.
6 Udi asks a question, "I'll get back to you. By the way,
7 did it take the customer two and a half years to get
8 implemented or did they start late?"

9 Go back up, Kim, to the e-mail. Blow the
11:25:16 10 whole top portion up. Dan Kraus writes back, again
11 talking about the vertical fastener distribution work,
12 and at the top Udi responds to Dan Kraus: "Too bad we
13 didn't stop the implementation of Business One before it
14 started."

11:25:36 15 That's because the development team for SAP
16 knew Business One would never work for Hodell. They knew
17 this well before the go-live date. They knew it before
18 the signing of the license agreement. They knew it with
19 regards to this testing.

11:25:55 20 Eddy Neveux knew it back in 2006. They all
21 knew this. This testing was from 2005. They knew this.
22 SAP knew this would never work for Hodell.

23 But the e-mail traffic doesn't stop then.
24 If we could go to Exhibit 77, this is also an April 12th,
11:26:23 25 2007 e-mail. Dan Lowery had written to Udi Ziv and he

1 says "Thank you for responding. As you can tell, we are
2 in a bad spot, so any expediency is greatly appreciated."

3 The next page, Kim. On April 13th, a day
4 later, "As you know, this customer's environment is far
5 outside the Sweet Spot of Business One with 120 users,
6 and therefore, we anticipate that such performance issues
7 will come up."

8 And then he goes on and he references to
9 Dan Lowery, he references a patch, a hot fix. And, Kim,
10 if you could go up to the top part. Dan Lowery writes
11 back, "Hope I don't sound stupid, but I don't understand.
12 'As you know, this customer's environment is far outside
13 the Sweet Spot of Business One with 120 users.' And,
14 therefore, we anticipate such performance issues will
15 come up."

16 "The whole reason they bought SAP was
17 because it was supposed to scale to their growth. They
18 are planning more acquisitions, adding more users, and
19 this was their known objective since day one, two plus
20 years ago by everyone, SAP included."

21 "Why did SAP let this go on so long? What
22 am I supposed to tell Hodell? This is unbelievable."

23 Kim, if you can go back to 77.1. Udi
24 responds internally. He doesn't respond to Hodell. He
25 doesn't respond to Dan Lowery. He writes to Dan Kraus,

1 copying Michael Sotnick, Rodney Seligmann, Niels
2 Stenfeldt, and he says, "Dan, someone needs to tell the
3 partner about the Business One Sweet Spot and that an
4 environment of 120 users and growing is nowhere near it."

11:28:50 5 Udi knew, based on this size, that 120
6 users would never work on Business One.

7 He goes on to say, "Due to the size of the
8 customer, I expect this not to be the last performance
9 issue they encounter."

11:29:10 10 This is the head of the development team
11 for Business One, and he's saying Business One is not
12 going to work.

13 Kim, if we could go to Exhibit 78. If you
14 could go down further, Kim, up to the next page, 78.3,
11:30:02 15 78.2. Let's try it one more time. 78.1.

16 Here at the bottom we have the e-mail that
17 we just saw from Dan Lowery to Udi Ziv. Dan Kraus writes
18 to Lowery and says, "Your development team and others
19 have been told that this is outside the Sweet Spot a
11:30:30 20 number of times. When Hodell purchased, there was no
21 such definition, but in the two years since we have
22 shared this information both directly and with your team
23 around Hodell-Natco and in general at the field kick-off
24 meetings."

11:30:45 25 Dan Kraus on April 15th, 2007 recognizes

1 that Business One is not going to work for Hodell-Natco.
2 He also recognizes that the sales team didn't know what
3 they were doing a couple years earlier when they sold
4 this because Business One's capabilities didn't change.
11:31:04 5 The testing was the testing.

6 And so we fast forward to one day before
7 the April 17th phone call. If you could put 157 up, Kim.
8 I'm sorry, Exhibit 77. Here we are again, one day before
9 the phone call, Udi Ziv is writing to Dan Kraus, and this
11:32:12 10 is the one that we just saw about the last performance
11 issue.

12 Then we fast forward to the phone call
13 itself on April 17th, and it's the day of the call.
14 Exhibit -- and we've seen a lot of e-mail traffic about
11:32:52 15 the date of the phone call and the e-mail prepared by
16 Geoff Ashley. Kim, I'm more interested in the response
17 to this on the first page. Here we have down at the
18 bottom Dan Kraus. Dan Kraus, who did not participate in
19 the phone call. You saw his testimony. He wasn't there,
11:33:08 20 but he writes, "There's no go-forward path here with
21 Business One."

22 The date of this phone call he knows this.
23 Geoff Ashley, Dirk Boessmann, Ralf Mehnert-Meland, all
24 these individuals are copied on this e-mail chain, but
11:33:23 25 Dan Kraus admits on that day that Business One isn't

1 going to work for Hodell, but no one told Hodell on that
2 call that Business One was not going to work. They like
3 to say that Dirk Boessmann, I think you recall the
4 testimony that Dirk Boessmann, Ralf Mehnert-Meland said
11:33:42 5 Dirk Boessmann was the guy who did all of the talking on
6 that phone call.

7 And Dirk Boessmann, and if you go back,
8 Kim, to the next page, is recorded as having said that
9 he, "Dirk, did an excellent job. He has set expectations
11:34:12 10 that this is an environment much larger than what we were
11 lead to believe."

12 And you recall that the testimony that Dirk
13 told them on the call that it was never going to work.
14 Dirk said it was never going to work. But Dirk Boessmann
11:34:28 15 didn't say that because if Dirk Boessmann had actually
16 said that on that call, why would he later write -- let
17 me find this e-mail for you -- 439. And this is May
18 22nd, well after the date of the earlier e-mail where
19 Dirk Boessmann allegedly told Hodell that the system
11:35:07 20 wasn't going to work.

21 He writes, "From my perspective, it is now
22 time to be honest to the customer."

23 If Dirk Boessmann was honest to the
24 customer on that call, why is he later writing this down?
11:35:22 25 Why is he making that statement? That's because no one

1 told Hodell on that call that the system wasn't going to
2 work. No one said that to Hodell.

3 In fact, Otto asked on that call "Did we
4 buy the right system," and he never received a response.
11:35:42 5 And you recall that testimony when Otto was up on the
6 stand. I mean, this was very difficult for him.

7 What he was told is what's recorded on
8 Exhibit 159, that they were on the high end. That's a
9 little bit different than being told the system's not
11:36:02 10 going to work.

11 Can we have Exhibit 160? Ralf
12 Mehnert-Meland on that same day writes, "Hodell asked the
13 right question today: Did we buy the wrong solution with
14 SAP Business One? Based on what we now know, the answer
11:36:27 15 is yes, as Lowery completely oversold SAP Business One."

16 Again, SAP is admitting that the product
17 was not properly sold, and they also are admitting that
18 they know Business One isn't going to work, but they
19 didn't tell Hodell on that call that the system wasn't
11:36:44 20 going to work.

21 Kim, if we could put up Exhibit 19. I'm
22 sorry, Exhibit 247. We also have Exhibit 247, yet
23 another e-mail from Udi Ziv, "Guys, there's not much that
24 we can do here. We will supply what may be a fix for the
11:37:18 25 current problem, but we know there will be others. There

1 is no doubt that this is not a B1 customer, and we
2 somehow need to get away from this."

3 Udi Ziv, again, he knows this isn't going
4 to work, but what are they telling Hodell? They're
11:37:30 5 telling Hodell at the same time, Exhibit 19, they're
6 telling Otto -- these are Otto Reidl's notes -- that
7 Patch Level 23 is ready to go.

8 They're telling Hodell, when they know all
9 along that this isn't going to work, they're telling
11:37:57 10 Hodell, "We're going to put a patch on. That's what
11 we're going to do."

12 Kim, if we could have 437. Paul
13 Killingsworth, Exhibit 437, writes to Kevin Reidl and
14 Otto Reidl, well after this April 17th call, and talks
11:38:29 15 about how the product and the additions are an
16 outstanding business solution for you and your company.
17 But Paul Killingsworth knows it is not an outstanding
18 business solution. You saw him testify. What did he
19 say? He said "Oh, I thought Udi Ziv was wrong." Udi
11:38:45 20 Ziv, who's the head of the Business One development team,
21 he was wrong.

22 Paul Killingsworth, who was basically a
23 customer service representative is saying that the head
24 of the development team for Business One is wrong?

11:39:07 25 In fact, on Exhibit 161, we have yet

1 another person saying Business One isn't going to work.
2 Here we have Gianluigi Bagnoli, June 13th, 2007, another
3 person involved in development. "From the numbers I see,
4 the customer is simply outside of the area B1 is supposed
11:39:34 5 to cover."

6 Killingsworth disagreed with Gianluigi as
7 well.

8 Exhibit 439. And we saw this e-mail
9 already, but Dirk Boessmann, recognizing May 22nd, 2007,
11:40:00 10 B1 is not going to work.

11 And here we are on Exhibit 259, yet another
12 e-mail from Dusan Lacko. Scroll down to the bottom of
13 the page. Is there another e-mail?

14 Dan Kraus is writing that they need an
11:41:13 15 update on the status for this customer. And, Kim, if you
16 could go back to 259.6. Blow this up. Dusan Lacko
17 writes in this e-mail to colleagues, "I was told all the
18 time it was always the last small thing we needed to do
19 for them," being Hodell-Natco, "So that SAP shows some
11:41:45 20 good will and SAP America can talk to them about moving
21 away from Business One."

22 Let's just string them along so we can move
23 them away from Business One.

24 He also recognizes the problems within
11:41:58 25 Business One. "The database is growing and we do not

1 have any archiving solution in Business One."

2 Again, the people overseas seem to know
3 Business One would never support this type of customer.
4 Kim, if you could go back up, please.

11:42:13 5 I think this bottom line kind of says it
6 all. "Never expect a tiger to fly. Never expect a tiger
7 to fly." That was the comment about Business One.

8 Now, Dan Kraus knows about how bad things
9 are going at Hodell, but yet during all of this time,
11:42:50 10 nobody is calling Hodell. And at the same time, you
11 heard Otto Reidl testify, you heard Kevin Reidl testify,
12 Jaime Clarke, how bad things are at the company, how
13 difficult things are for them to process orders. They're
14 not able to provide quotes. They're having a hard time
11:43:08 15 doing their day-to-day work activities.

16 Finally, we have people go out and perform
17 the testing which we saw, but on November 9th, Michael
18 Sotnick finally sends an e-mail -- 109. Michael Sotnick
19 writes, "From the SAP side, we've evaluated the processes
11:43:54 20 and approach and have come to the conclusion that there
21 is no change we can make on our side that would result in
22 a material improvement."

23 This is finally someone telling SAP,
24 someone from SAP finally telling Hodell-Natco that
11:44:10 25 there's nothing they can do.

1 But I submit to you all along, well before
2 the license agreement is signed, the testing never
3 supported the user size needed and required by
4 Hodel-Natco. Helmuth Guembel testified there's no way
11:44:33 5 Business One would ever work. This was a known fact to
6 the developers at SAP in Israel who knew the limitations
7 of Business One, and the moment they saw 120 users, they
8 knew Business One would never work for this company.

9 We've spent a lot of time talking about SAP
11:45:03 10 witnesses, and I wanted to talk just a little bit about
11 Ralf Mehnert-Meland. Kim, if you could put up Exhibit
12 157.

13 And I think you may recall this e-mail
14 dated April 16th, 2007. Again, this is the day before
11:45:28 15 the April 17th phone call. The next page, please.

16 He writes that, "Hodel just has too much
17 data. SAP Business One cannot handle it and there is no
18 fix in sight. I believe we need to find a way to get the
19 customer off SAP Business One."

11:45:48 20 Ralf Mehnert-Meland said that was a
21 knee-jerk reaction. He didn't really mean it; it was
22 just a knee-jerk reaction. Sort of like Paul
23 Killingsworth, you know, changing his testimony, Ralf
24 Mehnert-Meland is running away from the content of this
11:46:01 25 e-mail. It was just an emotional reaction, a knee-jerk

1 reaction.

2 So this is dated, if you could go back to
3 the date, April 16th, 2007.

4 Here we have another e-mail from Ralf
11:46:34 5 Mehnert-Meland where he's responding to Geoff saying "One
6 item from my mind. There is no way SAP Business One will
7 work for this customer. We need to find a way to move
8 them on. Plus, Lowery needs to take responsibility for
9 the mis-sell." That's yet another knee-jerk reaction for
11:46:54 10 Ralf Mehnert-Meland.

11 Dan Kraus, "No go-forward path here with
12 Business One." Kim, if you could just move up. That's
13 okay. But again, Dan Kraus, I guess his was also, you
14 know, a knee-jerk reaction, an emotional response to the
11:47:27 15 situation.

16 Ralf Mehnert-Meland came into this Court
17 and testified that SAP Business One was working just
18 fine, but after the visits that were made, he writes
19 that, "They have an abysmal performance, which is
11:48:01 20 essentially an issue of the number of users and
21 transactions."

22 He ran away from that e-mail as well. Ralf
23 Mehnert-Meland claimed during his examination that he
24 changed his opinion because he conferred with other SAP
11:48:24 25 employees and they changed his mind about his opinion

1 that Business One wouldn't work.

2 But on cross-examination, I think you'll
3 recall, he was asked to identify one of those employees,
4 and he couldn't name a single person. Ralf
11:48:37 5 Mehnert-Meland is running away from his earlier written
6 documentation, just like Paul Killingsworth; you know,
7 puppet on a string.

8 Geoff Ashley testified here that Business
9 One actually got better, but his earlier testimony,
11:49:08 10 you'll recall during his deposition, was different than
11 that, and he doesn't recall -- he didn't recall anyone
12 disagreeing with Hodell's conclusion.

13 In fact, when you put up Geoff Ashley's
14 e-mail, Exhibit 180, Geoff Ashley knew that this deal was
11:49:22 15 suspect from day one. So we have an awful lot of SAP
16 employees and former SAP employees doing their best to
17 run away from written e-mail documentation and earlier
18 testimony that they had given, and I submit to you that
19 the earlier e-mails are closer in time to what's going
11:49:41 20 on. This is when all the events are unfolding. This is
21 when people's memories are fresh. And things always
22 change after litigation.

23 In fact, if SAP's software ran as quickly
24 as their employees are running from their e-mails, we
11:50:01 25 wouldn't even be here today. We wouldn't have had the

1 performance issues that we had.

2 One thing I want to make sure we dismiss is
3 the notion that the problem wasn't with SAP's product,
4 that it was with In-Flight or with Radio Beacon. I go
11:50:19 5 back to Helmuth Guembel for his testimony on that fact.

6 He was very clear that there were three problems with
7 Radio Beacon. One, it was a two-tier architecture which
8 caused problems, and I think you remember, too, he talked
9 about the 32 byte versus 64 byte, how the memory for 32

11:50:40 10 byte is the equivalent of one DVD and 64 byte is like 64
11 billion DVDs, and how that was a big problem for Business
12 One and he also talked about the DI API. And the DI API,
13 he likened it to the security gate at the airport where
14 you walk through the airport and you have to get in a
11:50:57 15 line and you have to go in a queue and go through one by
16 one every time you want to get through.

17 And he likened the DI API to that where he
18 said any time you send something from the computer, from
19 your computer to Business One, you go through the DI API
11:51:12 20 and you have to go through security checks. And the
21 developer did that on purpose because they wanted the
22 Business One program to be secure, but that made the
23 system very, very slow.

24 And the DI API, which is part of Business
11:51:29 25 One, part of their package, is part of the problem.

1 And he was very clear that the problem was
2 with the Business One itself, with the architecture, the
3 DI API, and the 32 versus 64 byte notion.

4 As for hardware, Joe Vislocky came in and
11:51:50 5 he testified that the hardware was fine, the hardware
6 worked great for Hodell. When he arrived in 2007, the
7 hardware worked, and he didn't see any of those silver
8 slinky connector cables. You saw him testify. You can
9 judge his credibility. But Joe Vislocky was very clear
11:52:10 10 that there was no problem with the hardware at
11 Hodell-Natco.

12 So now we get to the part where I get to
13 talk about damages and financial harm to the company.

14 SAP put up a witness, Geoffrey Osborne, who
11:52:33 15 testified that despite all of these problems, despite the
16 fact that the system never worked for Hodell, that they
17 have zero financial harm across the board. I think you
18 can remember every category, zero, zero, zero, zero,
19 zero.

11:52:52 20 The only category he was willing to concede
21 on was some out-of-pocket costs but he even disagreed
22 with that calculation.

23 Well, what I'm here to tell you is, you
24 know what, that's simply not credible, it's simply not
11:53:09 25 possible given all the performance issues that they had.

1 I mean, you heard Jaime Clarke, you heard how difficult
2 his job was. And, in fact, what I have to show you is
3 some numbers and I want to put some charts up on the
4 board that we talked about before, and one of the things
11:53:22 5 I want to mention before I put those up is the Judge will
6 instruct you on damages. And the thing with Geoffrey
7 Osborne, he kept talking about what a forensic accountant
8 would do. That's not the standard. That's not the test.

9 You don't have to be a forensic accountant
11:53:42 10 to present testimony on damages and recover. That's not
11 the standard that's applied here. And what Geoffrey
12 Osborne does as a forensic accountant is different from
13 what Otto Reidl did as the owner of the company. And
14 Otto Reidl is the CEO of the company, and he's been in
11:53:59 15 this business for over 30 years. There isn't anyone in
16 this courtroom, including Geoffrey Osborne, who is better
17 able to talk about how Hodell was damaged and the
18 financial harm that was caused to that company. He knows
19 this better than anybody else.

11:54:18 20 And I want to put up for you a couple of
21 things. The first thing I want to talk about is how the
22 company was harmed and how we know that the company was
23 harmed.

24 I'm just going to put this up, first, to
11:54:58 25 show this to you. This chart shows two trend lines. It

1 shows the gross profit for the company, and it shows the
2 profit before tax for the company. And it shows the
3 divergence between the two.

4 And that separation is the equivalent of
11:55:23 5 overhead. Overhead for the company, what it costs them
6 to run their business.

7 Geoffrey Osborne took -- went to great
8 lengths to attack this particular demonstrative, and I
9 submit to you that's because he just didn't like what it
11:55:43 10 showed. But he did not testify, he did not say at any
11 point that he disagreed with the conclusion that there
12 was increased overhead. He never said that. He just
13 said he didn't like the way it was graphed.

14 But the fact that there was increased
11:56:02 15 overhead costs is shown on this document, and it's shown
16 in the financials. And you can see the timing of this,
17 and here's why the timing is important: It occurs right
18 before the go-live date. You can see, and right before
19 the go-live date, that's where Hodell-Natco started
11:56:20 20 paying for implementation costs and that's one of the
21 components of our damage claim.

22 The travel expenses to send employees to
23 Chicago for train-the-trainer sessions where you have to
24 send someone to learn about the system, that includes air
11:56:39 25 fare, that includes hotel costs, that includes, you know,

1 car rentals and expenses. That was incurred in this time
2 period.

3 Otto estimated that to be about \$50,000,
4 and that's one item of damages that we're seeking
11:56:53 5 recovery on.

6 Kim, if you could just type them on the
7 screen for the jurors so they can see what we're asking,
8 on a blank piece of paper.

9 But SAP has argued throughout this case
11:57:25 10 that, in fact, when we went on Business One, 2008 was the
11 company's best year, and they say that because the gross
12 sales were \$43,877,103, which if you look across, that is
13 in fact the highest number for gross sales.

14 However, Otto Reidl testified the correct
11:57:49 15 number to look at for your profitability is actually
16 profit before tax, and this is how Hodell measures how
17 well the company performed. And you can see the numbers
18 drop dramatically when Business One was implemented. It
19 went from \$1,506,000 down to 424 and to 869. And Otto,
11:58:16 20 in fact, testified that 2006 was in fact the company's
21 best year.

22 Now, here's what's interesting about the
23 difference between gross sales and profit before tax. We
24 all get a paycheck, and that top number on your paycheck,
11:58:35 25 your gross, that can be a pretty big number, but after

1 that, taxes are taken out, healthcare is taken out,
2 401(k) is taken out, and then you have some money that
3 you bring home. But even after you bring money home, you
4 still have to pay for your rent, you have to pay for your
11:58:55 5 mortgage, you have to pay for your groceries, you have to
6 pay for all kinds of expenses, normal living expenses.
7 What you have left at the end of the day, well, that's
8 your profit, that's what you get to put in the bank.

9 That's the same here. Gross sales, that's
11:59:14 10 like your gross pay. That's what's coming in the door.
11 And after you take everything out, you're left with
12 profit before tax. That's the money they made.

13 In 2008, they only made 869,000. You can
14 add 2007 and 2008 together when Business One was in use,
11:59:36 15 and it still doesn't equal 2006. 2006 was their best
16 year.

17 And Otto explained why their gross sales
18 went up. They didn't ship more pounds. Due to
19 inflation, it was sold for a higher price. They got more
11:59:57 20 money for the product. That's why the number is so high.

21 You can see on here the impact this had on
22 the company. Incoming orders went down. Pounds shipped
23 went down. Profit before tax went down. Percent to net
24 sales decreased. Sales and administrative expenses. I
12:00:37 25 mean, across the board, you can see 2007, 2008, that

1 there was a huge impact at Hodell-Natco. And one of the
2 items that we're seeking recovery for is actually the
3 increased overhead costs due to loss in productivity.

4 And I think the way to think about that is
12:01:13 5 like this: Suppose hypothetically you live, you know, on
6 a big farm and you have a huge plot of land that you need
7 to mow, and you have about five or six people who
8 actually come out to mow your lawn, and one day, every
9 lawnmower runs much slower. And it takes them a lot
12:01:34 10 longer to do the same work. That's why they're less
11 efficient, they're less productive, because the equipment
12 didn't work. And it takes them longer to do the same
13 job. That's what happened at Hodell-Natco. Because
14 Business One didn't work, it took them a lot longer to do
12:01:56 15 their job.

16 In fact, you heard Jaime Clarke testify
17 that FACTS worked a lot better than Business One.
18 Business One simply didn't work. It took them longer to
19 do their job. And that drove up the costs.

12:02:09 20 Otto performed a calculation, and in that
21 calculation, he determined company-wide that it took them
22 27, the equivalent of 27 additional people to ship the
23 same amount of pounds between FACTS and Business One.

24 And I want to borrow a demonstrative from
12:02:31 25 you if I may.

1 So I'm borrowing this chart because this
2 actually shows the number of employees at the company,
3 and I just want to provide you an additional item to look
4 at when considering this damage component.

12:03:07 5 So here you'll see in 2004, 2004, the
6 company shipped 21,532,388 pounds. Do you see that on
7 here? That's pretty close to 2007 where there were
8 21,103,982. Somewhat the closest comparisons that I see
9 on this chart.

12:03:39 10 But if you look at the difference in the
11 number of employees, you'll see that in 2004 -- it's hard
12 to read upside down -- there were 160 employees, but yet
13 in 2007 for the same amount of pounds, right here, there
14 are almost 27 more employees.

12:04:16 15 I mean, that supports Otto's calculation
16 that it took him the equivalent of 27 additional
17 employees company-wide to ship the same amount of
18 product.

19 So because Business One had an impact
12:04:34 20 company-wide, Otto averaged the average employee cost and
21 that was \$45,000 per employee. SAP Business One didn't
22 just impact the people in the warehouse. It impacted the
23 salespeople, it impacted upper management, it impacted
24 everyone.

12:04:54 25 So he averaged the costs. And when you

1 multiply the 27 times the average cost of employee, for
2 the period of time that Business One was actually at the
3 company and operating -- Kim, will you put that up for
4 me -- it's \$2,598,173. That's the financial impact that
12:05:22 5 Business One had on the company.

6 And Otto Reidl, to reach that opinion,
7 relied on documents that we produced in this case,
8 Exhibit 607 and 624.

9 And for our last damage component, those
12:05:49 10 are the out-of-pocket expenses, and Otto produced and we
11 produced in this case, all of the invoices and we
12 produced a summary sheet. And these are Exhibits 606 and
13 622. And you'll see that we didn't pay SAP directly on
14 these invoices. That's because our agreement was with
12:06:11 15 LSi. And how LSi distributed those funds to SAP, we
16 don't know.

17 But what we do know is that we've had
18 out-of-pocket expenses of \$830,440.12, and there's no
19 dispute and there's been no dispute in this case that
12:06:31 20 these payments were made in connection with this failed
21 software implementation.

22 And so these three components, lost
23 productivity of \$2,598,173, training and travel of
24 50,000, and out-of-pocket expenses of 830,440.12 -- Chris
12:07:09 25 is helping me with some quick math here -- equal

1 \$3,478,613.

2 I know it's a lot of money, but that was
3 the impact of Business One at Hodell-Natco.

4 Again, what I can say to you is that when
12:08:09 5 you consider all of the evidence and you look at the
6 facts in this case, I think it's pretty clear what
7 happened, and that is that SAP developed a product in
8 Europe. They knew what the product was about in Europe.
9 The developers knew the limitations of the product. They
12:08:30 10 had the testing done well before the license agreement
11 was signed showing the limitations of the product.

12 Helmuth Guembel talked about the
13 limitations of the product. This is all known to the
14 developers at SAP.

12:08:45 15 But what happened in this case, in 2003
16 when it first came over to the United States, the sales
17 team, for whatever reason, didn't get the message. They
18 didn't know who to market the product to. The marketing
19 literature is all over the board. Their internal
12:09:03 20 documentation is all over the board. And even the
21 testimony that we've heard during this trial is all over
22 the board about what size Business One could handle.

23 What we do know is that SAP wanted to make
24 sales in the United States. They wanted to sell the
12:09:20 25 product. They rushed the product to market. They made

1 the sale. They were excited about Hodell. They wanted
2 them because of their industry, because of their
3 business. They wanted to be in the vertical fastener
4 market. That's what they wanted to do. They were very
12:09:35 5 excited about that.

6 But all along, the product was not
7 appropriate for Business One, and SAP knew that. Then
8 when things started going south, you saw all the e-mail
9 traffic throughout the trial and the documents I've shown
12:09:51 10 you here; they didn't do anything about it. They strung
11 Hodell-Natco along for months, and as Hodell-Natco
12 continued, continued to lose money.

13 So it's our request that when you go back
14 and consider the facts, that you enter an award in favor
12:10:15 15 of Hodell-Natco.

16 Thank you.

17 THE COURT: Thank you, Ms. Luard.

18 Okay, folks. That will conclude this
19 morning's presentation. 1:30, does that sound good?
12:10:26 20 It's about ten after 12:00 right now, so that will give
21 you enough time to refresh yourself.

22 Keep in mind the admonition and we'll
23 conclude and see you at 1:30.

24 (Jury out)

12:11:27 25 (Proceedings adjourned at 12:11 p.m.).

1 WEDNESDAY, JULY 1, 2015, 1:29 P.M.

2 THE COURT: Good afternoon, folks. Have a
3 seat.

4 You may proceed.

13:35:25 5 MR. MILLER: Thank you.

6 Good afternoon, ladies and gentlemen.

7 THE JURORS: Good afternoon.

8 MR. MILLER: It's been awhile since June
9 15th, I know that.

13:35:35 10 A couple of things on that. I feel like a
11 reintroduction is in order. I'm Mike, Mike Miller.
12 That's my team. I think you heard and met most of them.
13 Greg and I worked together on this case for a long time,
14 and we talked before this case even got started that he
13:35:52 15 would do the opening and I'd do the closing. So here I
16 am.

17 Number two, on the note that June 15th was
18 awhile ago, I want to thank you guys for your service. I
19 know this is hard. It's hard on the lawyers but I know
13:36:08 20 it's also hard on the jurors. I know that firsthand.

21 My wife was a juror last winter. She got a
22 call out of the blue. The trial was even shorter than
23 this one. We've got three kids. It turned our life
24 upside down. So I get it, and thank you for everything
13:36:21 25 that you're doing. We know you're paying attention and I

1 know this is hard work. We're almost done. Okay?

2 A couple of things. Greg, when he did his
3 opening, had some demonstratives that I thought were
4 good, and they were helpful so I'm going to put these
13:36:41 5 back out. Now, I know you guys have learned a lot about
6 the case since then so maybe you don't need all this but
7 this is the one that has the key people. I tend to talk
8 fast so if I'm flying around from name-to-name, maybe
9 this will help you track it.

13:36:55 10 This one you've seen before. It's a really
11 simple timeline. Obviously, there are way more dates in
12 this case than on here but again I find it to be a pretty
13 helpful guide. And I don't know if you can see this, but
14 this is just a description of the four contracts. Right?
13:37:11 15 The ones we've heard about repeatedly.

16 They've got key people, that's who's who.
17 Key facts. Very quickly, the contracts, the distribution
18 agreement, the software development agreement that would
19 go with the distribution agreement. This was LSi and
13:37:28 20 SAP. The SDK was IBIS and SAP. The development
21 agreement, which was LSi and IBIS and Hodell. SAP wasn't
22 a party. And then the license agreement.

23 Can you see? Okay. And then the license
24 agreement, which was SAP and Hodell.

13:37:41 25 Okay?

1 So here's what I've done.

2 Obviously -- oops.

3 A JUROR: Sorry, can you move that one
4 over?

13:37:50 5 MR. MILLER: Sure. This way?

6 A JUROR: Yes.

7 A JUROR: Move that one.

8 MR. MILLER: Move that one this way? Ooh,
9 we were worried about that. I thought if I only went
10 over there once.

11 How about if I do this? I know that these
12 are worth it.

13 That would have been an epic start, right?

14 THE COURT: They wouldn't forget you.

13:38:14 15 MR. MILLER: No. Very, very memorable,
16 that lawyer.

17 Here's what we've got. We've got a lot of
18 testimony. And we've got a lot of exhibits. It is not
19 possible for me to cover all that testimony or all those
13:38:25 20 exhibits. It's just too much. It would take, like, the
21 length of time that we've already spent.

22 My job is to summarize it, and I've decided
23 that the best way to present it to you is in chapters,
24 like chapters in a book.

13:38:37 25 I've worked very hard on this case and

1 identified what I believe to be the key issues, and I've
2 organized them in a logical order. It's kind of roughly
3 chronological. It's not perfectly chronological. And
4 what I've done is I've collected what I believe to be the
13:38:52 5 key evidence on all of these key issues.

6 And please, don't be intimidated by this.
7 I'm not going to go through all of it, and some of it I'm
8 going to move through it very quickly, but I will tell
9 you this: I don't cherry pick, okay? These conclusions
13:39:07 10 I'm going to ask you to draw in connection with these
11 issues that are in these chapters are supported by real
12 evidence. It's not a grab this here, grab this there.
13 It's what this case has shown, and these conclusions I'm
14 going to ask you to draw, the evidence compels you to
13:39:22 15 draw them. Okay?

16 A couple of other things though before we
17 get started. This case has changed a lot. You'll
18 remember Judge Nugent told us at the start, you're going
19 to hear one thing in opening statements. Then you're
13:39:36 20 going to hear something else during the trial. And then
21 you're going to hear something else during the closing
22 arguments. Well, we're at the closing arguments. This
23 case has changed a lot. Okay? It shrank.

24 The only thing that's at issue right now
13:39:50 25 fundamentally, there's still a big story to tell, but the

1 only thing that's at issue fundamentally are whether two
2 SAP marketing documents are misrepresentations,
3 fraudulent misrepresentations they'd have to be in order
4 for you to find against SAP.

13:40:06 5 We'll talk about them. One is Exhibit 314.
6 One is Exhibit 617. There are a couple of sentences in
7 each one. I'm going to look specifically at those. But
8 after three weeks, or whatever it's been, two weeks and a
9 half, this case has boiled down to a couple -- all that's
13:40:22 10 left of it, a couple sentences in a couple of documents,
11 and Penny Vitantonio, right, the woman from American
12 Express, whose notes said a hundred users. We're going
13 to talk about her, too. That's all that's left in this
14 case.

13:40:37 15 And here's what I will tell you: The
16 evidence, there's no SAP misrepresentation whatsoever.
17 You're just not going to find it. And if there's anyone
18 here who maybe could have done something different or
19 should have done something slightly differently, it's not
13:40:55 20 going to be SAP.

21 It's going to be either Hodell or their
22 guy, Dale, Dale Van Leeuwen, who was very active in the
23 sales cycle and was the captain of the ship and who left,
24 or Dan Lowery, who was not active in the sale cycle but
13:41:09 25 was active in the project, and you've already seen from

1 the evidence, but I'll highlight some of it. He did a
2 terrible job of informing Hodel of what's going on.

3 And you're also going to see that B1 was
4 actually fine. It started out as there were some issues,
13:41:25 5 but it improved and ultimately was fine. They ran it for
6 two years. It's improved since then and they should have
7 stayed on it.

8 The problem here was In-Flight Enterprise.
9 And we'll talk about that, too. And then ultimately I'll
13:41:40 10 get to damages and walk you through what has been way
11 overly focused on in this trial, but at this point, I
12 don't think we can ignore it. So we're going to talk
13 about damages. And I'll show you my version of why the
14 damages are zero and in particular the productivity,
13:41:55 15 extra overhead damages are zero.

16 So Chapter 1. There is -- oh, by the way.
17 We have a PowerPoint, okay. You're welcome to, you know,
18 observe that as much as you'd like. I'm mostly going to
19 work off of documents, okay? And I'll try and hopefully
13:42:14 20 keep you kind of guided.

21 Chapter 1. There is a long history here
22 between IBIS and Dale on the one hand and Hodel on the
23 other. It goes back to the 1980s. We were thinking the
24 other night, maybe we can actually reference Ronald
13:42:28 25 Reagan. We only miss him by a year. Okay? This goes

1 back a long way.

2 Dale Van Leeuwen, first at his prior
3 employer and then at IBIS, worked with Hodell on another
4 ERP solution, right? We've heard about this. This is
13:42:43 5 that FACTS solution. Right? FACTS has got nothing to do
6 with SAP. FACTS is a totally separate company selling a
7 totally separate ERP solution, and it got installed, it
8 got implemented by Dale and his companies going all the
9 way back to the 1980s. And then into the 1990s when he
13:43:02 10 started out, Dale was the implementation manager.

11 This is not a dispute in the case. Okay?
12 Hodell doesn't like to talk about it, but they've never
13 said oh, that's not true. They know it's true. Goes
14 back -- they don't like to talk about it but it goes back
13:43:16 15 that far. He was the implementation manager. The
16 testimony is uniform. They had a partnership. They
17 worked together very hard.

18 Otto and Dale used to work through the
19 night on this. And Dale even testified, it wasn't just a
13:43:27 20 partnership. He testified that it was a marriage.

21 Can you call up that -- Bob's going to help
22 us with some quotes. You might have to blow that up,
23 Bob, because the resolution is terrible.

24 And this is me asking Dale on
13:43:41 25 cross-examination, "And you've even called this

1 relationship that was getting started with this
2 implementation going back to the early 1900s, you called
3 it a marriage, right?

4 "Answer: Yes. It very much is.

13:43:51 5 "Question: Okay. Because, and let's make
6 sure the jury understands, because once an ERP
7 solution" -- I almost laughed when I was asking this
8 question -- "once an ERP solution gets installed, once
9 you get married, then you have to support and maintain
13:44:05 10 that solution, right?

11 "Answer: That's correct."

12 Okay. Then what else do we know? We know
13 that after about ten years of marriage, ten, twelve years
14 of marriage, there was trouble. And they were on the
13:44:17 15 rocks. Right? And we've seen those exhibits. Now, Dale
16 tried to deny this. Ultimately, that just goes to his
17 credibility. You can't deny this. It's undeniable.

18 Look at 195. Bob, if you can call that up.
19 SAP has been showing you this and Hodell hasn't. It's a
13:44:34 20 January 24th, 2001 letter from Otto Reidl to Dale having
21 to do with the FACTS program and having to do in
22 particular with the eWMS part of it. Okay.

23 That's a reference to Radio Beacon, which
24 you know is relevant in this case, too. But this is back
13:44:52 25 when Radio Beacon, then called eWMS, was linked up with

1 FACTS, and Otto is not happy and he's writing to Dale in
2 a formal letter, "Our company spent a great deal of time,
3 effort and money to evaluate products, to communicate our
4 needs, and to prepare our warehouses for implementation.
13:45:09 5 Why? Because we've been around the barn several times."

6 I'm going to come back to that phrase.

7 "We've been around the barn several times." What does he
8 mean? He means they understand what's going on. They
9 have been on ERP before. They've implemented ERP before,
13:45:26 10 they know what the issues are and they are saying, "Don't
11 jerk me around. I know what I'm talking about," okay?

12 Later in our case, they tried to act like
13 they didn't know what they were talking about. And we'll
14 talk about that.

13:45:33 15 The implementation was undertaken with very
16 little preparatory work, sounds familiar, but instead was
17 on a modified-as-you-go basis. And then, Bob, I think
18 there's some more. At least I think there is. The next
19 page.

13:45:50 20 There you go. "If the product could
21 not" -- can you skip that, please? There you go. "If
22 the product could not provide the capabilities required,
23 all of the parties selling Radio Beacon as a
24 FACTS-integrated warehouse management system, had an
13:46:05 25 obligation to say so. They did not."

1 Sounds familiar, also.

2 Last point. "I'm not going to belabor the
3 point of the drop in customer service and lost business
4 in this letter." Sounds familiar again. "That issue is
13:46:18 5 reserved in the event I need to seal legal advice." This
6 is a very serious letter. That marriage was in trouble.

7 Go please to 311. Remember when I was
8 cross-examining Dale and I was asking him, hey, this
9 311 -- go all the way to the bottom. No, actually you're
13:46:31 10 right. Stop right there. Just scoop the whole thing,
11 Bob.

12 I was asking Dale, "Doesn't this suggest
13 that there was a likelihood of litigation of Hodell
14 against you?" And he denied that. Remember? And I had
13:46:43 15 to kind of walk him through this.

16 This is Kevin Reidl, two years later, but
17 the same system. July 11th, 2003. "In an effort to
18 clearly communicate my concerns with you," right,
19 "regarding eWMS," same thing as Radio Beacon thing, "and
13:47:02 20 The IBIS Group in general, however based on the level of
21 attention we received from your organization, how are we
22 to rely on you in the future when we need to keep a
23 larger computer software package running smoothly," et
24 cetera?

13:47:17 25 "In May, I went to bat for you before my

1 father. He was ready to take legal action."

2 It was right around then that Dale stopped
3 fighting me a little bit on whether this litigation
4 threat was directed to him, okay. And then there's
13:47:30 5 another one, and I'm not going to go through all this,
6 but just the last line on 311.

7 "Due diligence was never conducted at the
8 start of this project."

9 Dale didn't do due diligence in connection
13:47:42 10 with the Radio Beacon piece of the whole thing, and this
11 is very clear about that.

12 If you look at 312, I'm not going to
13 belabor this, but Otto complains to Dale, very quickly,
14 32 months and counting. Dale gives a response.

13:48:05 15 And just go to the top, Bob. That's
16 probably the easiest thing.

17 It's more of the same. I'm not even going
18 to quote this. You guys will have access to the
19 exhibits. If you want to look at 312, please do so. No
13:48:19 20 different than 195 and 311. Hodell is ticked off at Dale
21 and they're threatening litigation.

22 So why does this matter, right? Well, it's
23 a couple reasons. One is context. You need to
24 understand the history, okay? This case is not like, oh,
13:48:36 25 Dale Van Leeuwen, he's a lifetime B1 guy. He goes

1 door-to-door-to-door hoping to find a B1 customer, and he
2 finally knocked on the door and somebody answered and it
3 was Otto and he sold him some B1 software.

4 It's not that at all. It's the opposite.
13:48:50 5 Dale's not an SAP guy. Dale is a Hodell guy. And you
6 know this from this, going all the way back, like I said,
7 to the 1980s. But there's more. Remember, Otto admitted
8 that Dale didn't introduce B1 to Hodell. Hodell
9 introduced B1 to Dale.

13:49:12 10 So they knew each other on FACTS. They're
11 driving each other crazy and about to get in suits
12 together. And go to the next quote that we have, Bob,
13 please. This is Otto's testimony in this courtroom under
14 oath.

13:49:26 15 Can you just scoop that? Scoop is my word
16 for enlarging it. All right? "Okay. Mr. Reidl, could
17 you tell me when you became familiar with SAP's Business
18 One software?" That's a really good question. "Yes.
19 Around mid year 2003, I don't remember the precise,
13:49:46 20 month, et cetera, et cetera, that's June, '03, I attended
21 this trade show, et cetera, learned about these competing
22 products, et cetera, and I learned about SAP Business
23 One. I gave my card to the vendors. I don't know if
24 American Express got one from me, but then I got a card
13:49:59 25 from AmEx."

1 So there's no dispute. Hodell, they're the
2 ones that found out about B1. They went to Dale. Okay.
3 So look at the next snippet I've got. Same day. Otto
4 Reidl again, as if there's any doubt that he sent Dale
13:50:17 5 out in the world as Hodell's guy to figure out what you
6 would do.

7 "Just prior to receiving the quote, because
8 of my years of experience with Dale, I wanted to get his
9 opinion on a number of the products that we were looking
13:50:29 10 at, including Business One. I specifically mentioned to
11 him blank and blank and blank, and I had learned about
12 Business One. And I asked him to give me an assessment."

13 Now, Dale agrees, right? Go to Dale,
14 please, on this point. This is an undisputed point.
13:50:48 15 This is Dale. You remember this on direct? "Hey, can
16 you describe for me the process by which Hodell purchased
17 Business One?" And he tells you everything I just told
18 you. "I was supporting FACTS. They were having some
19 issues."

13:51:04 20 And then it says down here, in the bottom
21 third, "Hodell-Natco was actually approached by American
22 Express and introduced to the business -- the SAP
23 Business One application through American Express. Otto
24 called me up and said, you know, this is a product you
13:51:20 25 should look at as an organization."

1 And I stopped Dale on cross-examination,
2 you might remember this, and I said, "Dale isn't that an
3 understatement?" Because we had taken his deposition. I
4 knew what actually happened.

13:51:30 5 So go to the next line, please. So I asked
6 him, "Dale," scoop the whole thing, please, "would you
7 agree with me," we're talking Otto, "he actually directed
8 you, your word, as his partner, your word, to drill down
9 on Business One?"

13:51:50 10 "Answer: I would say that, yes. He felt
11 that this was a product that we should review and we
12 should consider as part of our portfolio."

13 In other words, it's not just that he said,
14 hey, Dale this is a product you ought to look at, "You
13:52:03 15 agree with me that he directed you as his partner to
16 drill down on the product both for yourself and for
17 Hodell?" And he said, "Yes, that's correct."

18 I realize this is a lot of detail.
19 Remember Star, Greg Star, as soon as he got started, he
13:52:17 20 said there was another part of the story. Hodell tries
21 to hide this part of the story from you. These guys go
22 way back. Dale Van Leeuwen was Hodell's guy. It ended
23 up mattering, and we'll talk about some of that. Go to
24 the next chapter.

13:52:33 25 This was a project, a big project, and it

1 had real risk, right? I know you've all heard this but
2 it's three components. It's B1 itself, it's Radio
3 Beacon, which had just about gotten IBIS and Dale and
4 Hodell in litigation, and this project, remember, it kind
13:52:50 5 of gets going months after that July letter. So it's
6 right on the heels of almost them being in litigation.

7 And number three, it's In-Flight
8 Enterprise. What's In-Flight Enterprise? We didn't hear
9 about In-Flight Enterprise much in that closing argument,
13:53:03 10 did we? We went like, I don't know, say it was two hours
11 long, I think it was, I'm not sure, might have been a
12 little bit longer. I think we went two whole full hours
13 before we even heard the word In-Flight Enterprise.

14 In-Flight Enterprise was a highly
13:53:18 15 customized piece of business software that had never
16 before existed that was being written from scratch by
17 IBIS and it was going to get stacked on top of B1 and
18 Radio Beacon, and it was going to be tried out for the
19 first time at Hodell, and we'll talk in a minute, and
13:53:35 20 then they were going to go sell it all over the country,
21 right?

22 Let's get an idea of how big of a deal
23 In-Flight was because if you are going to evaluate B1 and
24 somebody is going to stack In-Flight on top of it, you
13:53:51 25 better look at In-Flight or you really can't evaluate B1,

1 right?

2 Take a look, please, at Exhibit 11. I
3 think you probably all remember Exhibit 11. We've used
4 it for a couple different purposes but right now there's
13:54:05 5 the purchase of In-Flight Enterprise. This is a pitch
6 piece from IBIS to Hodell in October of 2014, and they're
7 saying hey, we think this In-Flight Enterprise is going
8 to take 3800 hours. Think about that. That's a lot of
9 hours. Okay?

13:54:21 10 Now, they're going to give it to them for
11 free, right? And we'll come back to that.

12 But let's talk about how big In-Flight is a
13 little bit more. Okay. Because remember on
14 cross-examination, me and Dale again, I tried to get him
13:54:36 15 to admit, look, let's make sure you guys understand this
16 product B1; it's done. It's for sale. People can go buy
17 it, like you could go buy something in Staples. This way
18 with SAP, you buy it from a dealer, but the product is
19 done, the market is open. If somebody wants it, they can
13:54:56 20 get it. Now, he fought me on it a little bit, but then I
21 got him to concede.

22 And go to the next slide, please. Scoop
23 that whole thing, please.

24 And we had just been looking at Exhibit 11,
13:55:09 25 so it's kind of easier to follow this. "And your point

1 is that so in connection with this project, the hours
2 that you're talking about that needed to be devoted that
3 are listed here on 11, right, that's the 3816, you would
4 agree with me that the vast majority of them weren't with
13:55:24 5 respect to B1, which is a product that's out in the
6 market, but instead they were with respect to In-Flight
7 Enterprise?

8 "Answer" -- he couldn't have been more
9 clear -- "These hours were a hundred percent related to
13:55:35 10 In-Flight Enterprise. Thank you." He couldn't stop
11 himself. "That is correct. Okay, thanks, Dale. Okay.
12 Now, we got it," but there's more.

13 Take a look at -- remember Joe Guagenti?
14 Joe Guagenti came in here. He's not an SAP employee. He
13:55:49 15 wrote In-Flight Enterprise, okay? He was the head code
16 writer for In-Flight Enterprise.

17 Look what he said. Remember his block,
18 block and a half analogy. His point was, yeah,
19 In-Flight's big. It's bigger than B1. So the thing
13:56:07 20 that's stacking on top of B1, it's bigger and also on top
21 of Radio Beacon, bigger than B1.

22 "Are you familiar with the size? Yes. Is
23 that because you wrote the whole thing? Yes. Give us a
24 sense of how big it is? Sure. If SAP was one city
13:56:24 25 block, that's B1. In-Flight, the size of In-Flight was

1 like one city block, maybe more. Maybe one and a
2 half" -- sorry, I read it wrong -- "maybe one and a half
3 city blocks. So it was quite a bit larger or equal to
4 the size of SAP, that's Business One, itself. I mean
13:56:42 5 that's how big this application was."

6 And no one disputes in this whole case SAP
7 didn't write a line of IFE code. I say "IFE" sometimes.
8 That's In-Flight Enterprise, same thing.

9 And the contracts, just to be clear, SAP
13:56:58 10 wants nothing to do with these add-ons that are built by
11 these people who sign distributor agreements and
12 distribution agreements and SDKs.

13 And we're clear about that. Our
14 relationship was different. We created and we sell B1.
13:57:12 15 If somebody wants to have a distribution agreement and
16 they want to go sell B1 out in the world, they can do
17 that. If they want to build add-ons, then they execute
18 one of those SDKs, and they can do that. And if a
19 company like Hodell wants the software, then, fine,
13:57:26 20 they've got to sign a license agreement with us.

21 And all that kind of happened here,
22 although it's all screwed up with IBIS and LSi because
23 IBIS doesn't have a distribution agreement, and I'll talk
24 about all that stuff.

13:57:38 25 But all three of those contracts, the

1 distribution agreement and the software development
2 agreement, we weren't a party to this one, skipping, and
3 the license agreement, they all say, hey, SAP wants no
4 responsibility for these add-ons, which makes perfect
13:57:51 5 sense. We don't write them. We can't control what
6 people are going to decide to stack on top of our
7 product.

8 And just this part may be a little bit
9 boring, but can you call up 32? I just wanted to see,
13:58:03 10 the contracts do say this.

11 I think it's -- all right, fine. This is
12 the SDK, right? This is IBIS's contract that is signed
13 in December of 2003 with SAP, and this is the contract
14 that expired because they never had a distribution
13:58:22 15 agreement. Okay. And I'll come back to that, too.

16 It expired six months after it was
17 executed. IBIS was out there acting like they still had
18 a contract with us. It's a whole other story, but go to
19 8.8 -- just 8. Can you blow that up?

13:58:39 20 It's legal language, and it's in all caps,
21 though, for emphasis. And the people who are entering
22 into these contracts know exactly what it means. I had
23 underlined the key part. "Licensee extensions and any
24 third-party software." So SAP disclaims everything, the
13:58:57 25 short version of that, having to do with licensee

1 extensions and any third-party software. That's add-ons,
2 okay?

3 So go quick to 30. I just want you guys to
4 see.

13:59:07 5 We put this in every contract, and it's in
6 every contract that's in this case. This is the
7 distribution agreement that LSi signed. Likewise, in
8 December of '03. And for this one, it's Section 12.2.
9 This one's even thicker, but look, it's right up top,
13:59:33 10 same idea. They disclaim all responsibility for
11 third-party software.

12 I'm not going to bore everybody. So go to
13 316, please.

14 This is the contract that Hodell signed,
13:59:46 15 okay? They got IBIS saying, fine, you guys are going to
16 step away from add-ons, makes sense. LSi is saying fine,
17 step away from that. Hodell says fine. This is their
18 contract with us. I think it's 7.1.

19 Okay. "SAP warrants that the software will
14:00:09 20 substantially conform to the specifications," et cetera,
21 et cetera. "The warranty shall not apply."

22 Romanette 1, and it kind of continues over
23 here. "If the defect is caused by a modification,
24 integration add-on."

14:00:23 25 You can spend all the time you want looking

1 at 316, that's our license agreement. Hodell signed it
2 with us. It's in perfect English. Those are defined
3 terms. That's In-Flight Enterprise. We don't have any
4 responsibility for it.

14:00:33 5 Okay. Very quickly go to 8 because I'm
6 talking about making the point in Chapter 2 that this is
7 a big, risky project. Hodell knew that. These are Otto
8 Reidl's own notes. This is right around the time of that
9 Exhibit 11. "Hodell-Natco concerns." They have
14:00:53 10 concerns?

11 Look at item two. Oh, they're concerned
12 that this is a custom development. That's In-Flight
13 Enterprise. They're concerned about that. And what
14 else? They're concerned about SAP's commitment. That's
14:01:05 15 what I was just telling you. Otto knows they're doing
16 something here that's big and risky, and SAP is not
17 committing to it, and they've got concerns.

18 So look, please, at 740. Just more of the
19 same. This one's a little tough to read, but just scoop
14:01:25 20 that whole thing.

21 This is Otto to Lowery and Van Leeuwen,
22 November of '04, second sentence, "Although I'm unhappy
23 about playing a developer, a pioneer, the guys with the
24 arrows in their back, role," the attached agreement, and
14:01:41 25 it basically says, "Okay, we'll do it." He doesn't

1 exactly love that he's a developer, but he wants to get
2 the benefits of it, and I'll talk about that in a second.

3 But he definitely knows those are the guys
4 that get -- the pioneers that get the ideas and are going
14:01:52 5 west and whatever, but they get the arrows in the back.

6 Okay. So Chapter 3. It's not just that
7 it's a big, risky project. This is a joint venture.
8 This is another thing Hodell doesn't like to talk about.
9 I'm going to get right into it. Let's get into how it
14:02:10 10 works.

11 Not only is Dale Hodell's guy out in the
12 world, throwing down, finding out for them, they go into
13 business together. And there's no dispute, by the way,
14 in this case that that was true.

14:02:22 15 Like this is another one of the things
16 where they don't like to talk about it, but these facts
17 are not contested facts. The idea was let's get Business
18 One, stack Radio Beacon on top of it, get this giant
19 In-Flight thing that's even bigger than B1, stack that on
14:02:37 20 top of it. We'll be the first ones to use it, but we'll
21 sell it all over the country.

22 There's nothing wrong with that, as a
23 principle, but that's not us doing that. That's them
24 doing that, and let's look at how they had that set up.

14:02:50 25 Look at 291, Bob.

1 Very quickly. This is the development
2 agreement, right?

3 So contract number three. Who is a party?
4 Not us. This is IBIS -- well, sorry, missed the most
14:03:05 5 important one. Hodell and IBIS and LSi, right? And what
6 is the project description? And you got the timeline,
7 right, so it's right here. Right? They're signing the
8 development agreement, signing this agreement right here.

9 What are they doing? It's the development
14:03:21 10 of IBIS's In-Flight Enterprise application and its
11 integration into SAP Business One. The development
12 agreement is building In-Flight. That's what it really
13 is.

14 There's a little bit more to it, but here's
14:03:34 15 how it works. Hodell pays 300,000, right? See that
16 300,000 purchase price in the lower right. Go to the
17 next page. I've highlighted this to make it easy for
18 you. There you go. And here's what they get in exchange
19 for their 300,000. Thank you, Bob.

14:03:50 20 One, they get unlimited user licenses for
21 In-Flight Enterprise, okay? And then upon -- this is
22 down to three, on successful completion of In-Flight,
23 once it's done, IBIS and Hodell are going to go out into
24 the world and try to sell it to other companies, and
14:04:11 25 Hodell gets a hundred dollars for each of the first 1,000

1 licenses that they sell to somebody else.

2 Now, you know, other fastener companies,
3 because they're trying to create -- remember the
4 testimony about the microvertical, they're trying to
14:04:22 5 create -- they're trying to sell it to all the fastener
6 companies they can, and Hodell can make \$100,000 from
7 that.

8 Okay. So go back, please, to 11. I just
9 want you to see the math. Scoop right -- just a piece of
14:04:36 10 that. There you go. That's fine.

11 It's the -- this is rough math, but it's
12 sound. It's 3816 hours that were estimated at the
13 beginning. The going rate for labor for IBIS is 150
14 bucks an hour. If you times 3816 times 150 bucks an
14:04:52 15 hour, that's \$572,000 of free In-Flight Enterprise, plus
16 if they succeed with this business venture and their
17 joint venture works out and they sell a thousand licenses
18 to someone else, Hodell gets another hundred thousand.

19 So remember Greg Star was kind of walking
14:05:11 20 Otto through, "Hey, how come you walked away from
21 American Express?" Greg's point was, "Look, you're not
22 the type of company that you'd like to come off as. You
23 guys have 40-some-odd-million-dollars in sales. How come
24 you were so cheap when it came to American Express and
14:05:26 25 you said you had to beat this by at least half?"

1 And this gives you a flavor for what's
2 going on. They weren't just being cheap with American
3 Express; they were going into business and they were
4 going to spend \$300,000, and they were going to try to
14:05:38 5 double their money and make 672,000. Think about that.
6 They're not out there trying to find, hey, what's the
7 best software for our company and all the people that
8 work here. If they were really thinking about that, they
9 probably would have bought from American Express. Okay?

14:05:52 10 They had this other idea with someone they
11 were about to a couple months before that to get into
12 litigation where they cut their price in half, pay
13 \$300,000, and maybe double their money getting 672,000
14 back, which obviously didn't happen.

14:06:08 15 Very quickly, I think this is uncontested,
16 but I can't resist. Look at 755. Otto admits that this
17 was to make money. Notes. "If they want us to be a
18 development partner, we should see rewards from the
19 success of the product. Commissions on future sales."

14:06:24 20 That's the hundred bucks times the
21 thousand, right?

22 Look at this next piece which is great. It
23 totally proves one thing, that -- go to 10, please, Bob.
24 The In-Flight pass was IBIS's restitution. So they're
14:06:43 25 doing two things. They're going out into business and

1 they want to make some money, 672,000 in value, and they
2 want to settle this whole Radio Beacon dispute that
3 almost resulted in litigation.

4 These guys were trying to do a lot, okay?

14:06:56 5 And look at the next exhibit. You
6 can -- well, fine. Go ahead, put it up there.

7 Jon Woodrum from IBIS, he called this a
8 joint venture. I mean, those are his words, not mine.
9 You can barely read it, it's at that third arrow. I
14:07:14 10 thought that was funny.

11 Anyway, Hodell, there were -- you could
12 tell from some of the questions that they asked during --
13 might have been in the opening statement but it really
14 came out in the questions. They were trying to suggest
14:07:27 15 "We're not really involved in this. If there is a joint
16 venture, we're not really involved."

17 Well, they're the investor. You can be a
18 joint venturer and be the cash guy. Right? Cash, cash
19 is what drives ventures like that. They're the ones that
14:07:42 20 came up with the 300. Remember, only about \$150,000 ever
21 came to SAP in this whole case. That other 150 or
22 whatever it turns out to be, that's the funding for this
23 joint venture to build this In-Flight Enterprise.

24 And, Bob, if you go just -- I think we --
14:07:56 25 go to the next quote. I think this point is made, but

1 this is Kevin, I think, "You'd agree that you were part
2 of this joint development project, you were providing the
3 funding, and you were taking the risk as the pioneer, the
4 guys with the arrows in your back?

14:08:11 5 "Answer: Yeah, because we were going to be
6 the first with this software." They were going to rush
7 to market and be first.

8 So just skip the next one, Bob. That's
9 planning for Chapter -- what we're calling Chapter 3.

14:08:27 10 So it used to be that part of this case was
11 that Dale and Dan were acting on behalf of SAP. That's
12 gone. Okay? That's not in this case. So some of this
13 doesn't exactly match up because this case changed and it
14 shrank, and I have to kind of conform what I'm talking to
14:08:46 15 you guys about on the fly, but I want to make this point
16 because the contract, all right, this one, 316, it
17 doesn't just say that Dale and Dan or whoever is out
18 there selling our software is not our agent. It does a
19 lot more than that, and it matters.

14:09:01 20 Can you call up 316, please? Now, this
21 thing's got a lot of stuff in it, but I'm going to try
22 and move quickly. Yeah, 7.1 and 7.2. Well, that's just
23 that they're not an agent. Go to 7.1 so I can avoid
24 dropping my papers.

14:09:29 25 Sorry. I meant Section 7.1 of 316. It's

1 on 316.3. The next page. Yeah, you're going to have to
2 blow that up. My eyes are getting tired. Can you blow
3 it up more or just stretch it? Okay.

4 SAP warrants what? Warrants what the
14:09:56 5 software will do. It will conform to the functional
6 specs contained in the documentation, and that's it,
7 period.

8 Here's what it doesn't apply to, and we've
9 walked through some of that. I'm not going to spend a
14:10:07 10 lot of time on that. You're welcome to go back. It's
11 7.2.

12 SAP and its licensors. All right. This
13 contract is between SAP America and Hodell. Okay? But
14 if you read this contract, the licensor, that's SAP AG.
14:10:23 15 That's the German parent that Hodell is desperately
16 trying to drag into this case because they don't have a
17 case to begin with that's left. Now, they're just
18 reaching and lurching.

19 But I want to be clear, when Hodell signed
14:10:37 20 this contract, they agreed that SAP America and SAP AG
21 were disclaiming liability. "SAP and SAP AG disclaim all
22 other warranties express or implied including without
23 limitation" -- (Pause)

24 I told them I'd talk fast, but I hear you,
14:11:12 25 I'll try to slow down. How is that?

1 "Limitation and implied warranties and
2 merchantability or fitness for a particular purpose,
3 except to the extent that any warranties implied by law
4 cannot be validly waived."

14:11:36 5 Okay? And just very briefly, there's 9.3,
6 that's further down. That's a limitation of liability
7 provision. Okay. Same deal. It inures to the benefit
8 of SAP America, and its desperate attempt to bring in SAP
9 AG doesn't work because they have protection under that,
14:11:52 10 too.

11 I'm not going to spend time -- go to the
12 last one. The last one is an entire agreement.
13 Everything that everybody has talked about, including the
14 writings -- and I'll talk about the writings in this
14:12:05 15 case -- they're out the window. It's only what's in this
16 contract that counts, okay?

17 And Hodell signed this contract, and let's
18 be clear, they -- Kevin Reidl and Otto Reidl, they
19 admitted that they got the license agreement, it was in
14:12:25 20 plain English, they read it, they understood it. I mean,
21 I know right now it would be a drag to go through every
22 word there, but if you were Hodell and you're buying this
23 software, you're going to read that thing.

24 And we took their depositions and asked
14:12:37 25 them, "Hey, did you read this?" And they said, "Oh,

1 heck, yeah, we read it and understood it. We agreed with
2 it. And then we signed it."

3 Right. And I've got a couple of reminders
4 for us all. Can you go to the next transcript clip?

14:12:52 5 This one's Otto. "And you understood everything in the
6 license agreement? Correct."

7 Go to the next one. Otto again: "Your
8 view of the license agreement when you read this thing at
9 the end of December of 2005, you actually agonized over
14:13:15 10 signing it, right?

11 "I'm sorry?

12 "Question: You actually agonized over
13 signing the license agreement, correct?

14 "Answer: Correct."

14:13:25 15 But he signed it.

16 Kevin Reidl, one more. This is Kevin.
17 He's the guy that actually put the pen to paper. "You're
18 the one who signed the agreement? Yes. When we talked
19 about" -- this is Court testimony, right? We all heard
14:13:38 20 this. Sometimes it doesn't seem -- this isn't a
21 deposition. This is what happened in front of us. It
22 may not be every word, but this transcript came from
23 Shirle and Sue, and that's what they said.

24 "And when we talked about this, is it true?

14:13:50 25 "Right?

1 "And that, in fact, happened?

2 "Right.

3 "You took this very seriously?

4 "Yeah, we reviewed it and signed it, yes.

14:13:56 5 "Question: And you understood everything
6 that was written in this document, right?

7 "Answer: Yes. It was pretty boilerplate."

8 So everything I was just walking through,
9 and kind of running through, but before you even begin to
14:14:06 10 think about SAP here, you have to look at that contract
11 and they agreed to all that stuff, okay?

12 Here's another point: Their guy Dale,
13 okay, he was the guy during the sales process -- and I
14 just want to make sure you guys understand kind of the
15 distinction between Dale and Dan, right? Dale's back in
14:14:20 16 the eighties. Dan comes way later.

17 And there's some testimony from Dan where
18 he flat out admits he had nothing to do with the sale.
19 The sale problems that Hodell had were the fault of
14:14:36 20 Hodell and their guy Dale. They shouldn't have hired
21 someone they were getting ready to sue.

22 But go ahead and look at the first clip.

23 I think if you go -- that's it, just go to
24 the trial transcript for Dale. This looks about right.

14:15:12 25 Yeah.

1 Remember, Judge Nugent kind of stopped Dan
2 Lowery, he wanted to know.

3 "The Court" -- this is Dan Lowery and the
4 Judge is asking him, "When you tried to make the sales
14:15:27 5 pitch to Hodell, who did you talk to?

6 "Well," the witness, says, "the sales pitch
7 was made by Dale.

8 "The Court: All right. So that wasn't
9 made by you, right?

14:15:36 10 "Answer: The what, sir?

11 "It was not made by you, the sales pitch?

12 "Answer: No."

13 Okay. I have a couple more of these. I
14 want to go through them real quick. I want you to know
14:15:47 15 what happened here. It must be hard to sit there and not
16 be able to take notes and we're flying by you guys
17 throwing papers left and right.

18 I'm trying simultaneously to move quickly
19 so that I don't waste time and bore you guys, but I want
14:16:01 20 to spend some time because like I said at the start, I'm
21 not cherry picking. This is what these -- we haven't
22 even gotten close to anything that's contested yet.
23 These are important base facts. Okay.

24 "Mr. Lowery, did you talk to anybody?

14:16:18 25 "Dale did most of the selling."

1 There's another one. I think there's
2 another one. Yeah. "Dale was the one. He was the
3 salesman? Yeah."

4 And then what about Dan, right? Dan Lowery
14:16:30 5 admitted he didn't hear about Hodell until after his
6 company, LSi, bought IBIS. Remember that? IBIS existed.
7 It worked with Hodell.

8 Dan Lowery and his company, LSi, bought
9 IBIS, and they basically kept him as a subsidiary. They
14:16:47 10 purchased them in -- and there was a little bit back and
11 forth -- we'll call it May of 2004. That's the first
12 time Dan Lowery heard of Hodell, and then he admitted
13 that he didn't meet them until September of 2004.

14 So at this point it's May. Dale is the
14:17:04 15 guy, but very quickly, go to 830. I think it's the next
16 exhibit.

17 This is Lowery writing to the Reids,
18 September 12th, '04. Oh, boy. "Thank you for your time
19 and the opportunity to discuss your business. I enjoyed
14:17:22 20 meeting with you." Pardon me. "I enjoyed meeting you
21 both and the tour of your operation."

22 So that sets something in time. The guy
23 just met them the day before. Okay?

24 All right. So where do we want to go next?
14:17:38 25 Let's keep moving.

1 This one's fun. Next chapter. B1 is a
2 dynamite product and SAP has lots, has gobs of happy
3 customers who have more users than Hodell. And some of
4 those sales were before Hodell and some of those sales
14:18:04 5 were after Hodell.

6 Remember Paul Killingsworth came in here
7 and testified? Customer service. He's an executive at
8 SAP. He's in charge of B1. It's his baby. He spoke
9 with pride about B1. It was clear, they have 40 to
14:18:23 10 50,000 customers. 40 to 50,000 companies are running B1.
11 That's a lot of companies. Okay?

12 And remember Dan Kraus came in? He was
13 kind of the same. He doesn't even work for SAP anymore,
14 but he's still in software. He volunteered to come here,
14:18:43 15 tell us about B1.

16 And look at what he said, if you'd call his
17 transcript up. This is -- it's one of those things that
18 once you get it, you get it. "All right. Separate and
19 apart, is it true or not that B1 has worked well for
14:18:59 20 companies that actually do have up to 500 employees or
21 more?"

22 Which by the way, when you go to the couple
23 of little things that are left in this case, it's, hey,
24 does B1 work for companies with one to several hundred
14:19:12 25 employees or does B1 work for companies with between one

1 and 500 employees? And I'm going to be talking about
2 this, but you're darn right it does.

3 It totally does, and there's lots of them
4 out there and we have a stack of exhibits that show them.

14:19:27 5 Now, Hodell had some issues, but that was
6 specific to Hodell and it was because of a whole bunch of
7 things Hodell did, and we ultimately think B1 worked for
8 them and they should have stuck with it, et cetera, et
9 cetera.

14:19:39 10 But when you see something like that, stop
11 yourself and say, "Okay, don't forget that," okay,
12 because B1 works for companies with hundreds of
13 employees.

14 But look at what he says here. And I'm
14:19:49 15 going to come to that in a second. "We had a number of
16 customers before Hodell ever bought B1 that were large,
17 and we've had -- well, since I've left and even before
18 there were a number of customers that have bought the
19 product that used it successfully that are very large.
14:20:00 20 Okay. Thank you. Thank you. We'll come back to that."

21 And I decided, no, let's talk about it
22 right now, right?

23 "Question: Tell the jury, has B1 been a
24 successful product?

14:20:10 25 "Absolutely."

1 This is where it gets good.

2 "B1 has more than 40,000 customers that are
3 using it around the world, and generally you would look
4 at a product, whether it's successful or not, based on
14:20:21 5 the adoption. And 40,000 companies running a product is
6 a lot of companies running a product. So, yes, it's been
7 a successful product."

8 And he goes on to talk about the range of
9 size, and he talks about how some of them are small and
14:20:39 10 some of them are large. But the reason, the main
11 reason -- and that's part of the reason, I guess -- but
12 the main reason I wanted you to see that is that's his
13 point. Hey, is B1 a success? Of course, it is.

14 They didn't sell 40,000 copies the first
14:20:50 15 day. They've been selling B1 for a long time, and 40 to
16 50,000 companies over that period of time that decided to
17 buy it, it's self-proving. It's definitely a successful
18 product. They sold it to 50,000 companies, right?

19 And look at, can you call up 700? This is
14:21:11 20 700. I hope I don't drop this, that would be bad.

21 Mr. Killingsworth testified about this.
22 It's a list of all customers in the history of B1 around
23 the world that have more than 50 users. Okay. I'm
24 running out of space.

14:21:34 25 But very briefly -- I'll try not to get too

1 close -- this thing's huge. Okay? It's 26 pages long,
2 and over in this column it takes, like, the professional
3 licenses and the limited licenses and it adds them up.
4 And if you look at the top here, that's just kind of a
14:21:54 5 sampling -- no, no, that's the top. See in the upper
6 right-hand corner, 5766? And it goes down from there,
7 it's in decreasing order by total number of users. It's
8 26 pages long.

9 And my friend Joe walked Paul Killingsworth
14:22:09 10 through this. Thank you for this, Joe; you gave me a
11 little cheat sheet. There are over 2000 companies on
12 this list with more than 50 B1 licenses. There are 500
13 companies with more than a hundred user licenses.
14 Notable names: Loreal, Unilever, Phillips, Coca-Cola,
14:22:31 15 Haines, Chevron, et cetera. More than 250 of these
16 companies have more users than Hodell.

17 And then if you get -- if you look at it,
18 it's got an industry column, and you can find there
19 industry which is wholesale. There are 28 companies in
14:22:43 20 the wholesale industry with more users than Hodell.

21 This is a very important exhibit. So is
22 this one, 834. 834 is like a reduced version of 7. It's
23 just the '03 and '04 sales worldwide to companies with
24 more than 50 users. And there's been all this testimony
14:23:08 25 about, oh, well, maybe Hodell was the biggest company

1 that they'd ever sold to, which is totally not true.

2 And if you look -- thank you, Bob. Is that
3 about as big as we can make it, I guess? These
4 are -- this is 834. The green are U.S. companies that
14:23:28 5 were prior to Hodell because this is '03 and '04. And
6 remember, Hodell doesn't get our licenses until December,
7 '05, and there are at least four big ones, United States
8 companies, Chevron, Koehler, Respironics, and there's
9 another one at the bottom called Attica, so Hodell wasn't
14:23:48 10 our biggest company at the time. We had other prior
11 sales.

12 It's interesting, Hodell at the trial, they
13 hate these lists. This is a big problem for them. Okay.
14 So what do they try and do? They try and say, "Well, you
14:24:02 15 don't tell whether there's an add-on in here and you
16 don't tell, well, maybe they were running it in separate
17 subsidiaries" or something like that, right. Or they
18 criticized it because it's not broken out some other way.

19 This report is what it is. This is a
14:24:17 20 report that can be run at SAP, and we ran it. If they
21 wanted to investigate that, they had these lists. Okay.
22 They could do it, but they haven't. They just brought it
23 up at trial and took a swipe at it.

24 And remember what happened? Okay. They
14:24:29 25 asked Paul Killingsworth, "Hey, wait a minute, aren't

1 these separate installations?"

2 And he said, "Whoa, whoa, wait a second.
3 I've not conducted that study. That's
4 definitely nonsense." He didn't say it. It was clearly
14:24:39 5 nonsense, you could tell by how he was reacting.

6 But right off the top of his head he
7 remembered two companies that were not just in the
8 wholesale business, but they were, like, incredibly
9 analogous to Hodell. And he named them off the top of
14:24:53 10 his head. One was Fairview Fittings which is on this
11 list and one is Tech Equipment. Fairview had 153 users.
12 Tech Equipment had 159. Total single installations.

13 Okay. And remember, they didn't have the
14 guts to ask Dan Kraus about that. They just didn't.
14:25:12 15 They ditched that idea because they felt like maybe they
16 scored a quarter of a point and leave it and argue it
17 later, instead of doing what they should have done which
18 is if this is what they are going to say, then
19 investigate it, which they never did.

14:25:23 20 And then they tried to ask Brooks Hilliard
21 a question about it. And remember what he said? I have
22 a quote from him. Brooks Hilliard checked with SAP about
23 that issue, and they looked at the range of companies
24 with between 60 and 300 users on this list, and found
14:25:37 25 that the vast majority of them are single installation.

1 So that's the end of this issue. We
2 got -- this is a massively successful product. It's
3 not -- it's not ERP ECC. We're not selling it to Fortune
4 100 companies. It's not All-In-One. But it's massively
14:25:56 5 successful in its space, and it's continued to improve,
6 and we have lots of happy customers with more users than
7 Hodell.

8 I'm going to take a drink.

9 So let's talk about the marketing
14:26:16 10 materials. There are two documents that we're talking
11 about. One is 314 and one is 617. I'll talk about both
12 of them kind of first. These are high-level promotional
13 materials and they're both from 2003. Okay?

14 They're not specific to Hodell. This
14:26:43 15 wasn't like a Hodell proposal, "Dear Hodell, we've
16 checked you out." These are out there in the world about
17 B1, high-level promotional material.

18 Do you remember what Your Honor said about
19 the funny legal word -- I don't like saying it because it
14:27:01 20 sounds funny -- puffery. Okay? What that means is it's
21 okay for the pizza shop to say world's best pizza. Okay.
22 If you don't like the pizza, you don't get to sue them
23 the next day and say "That wasn't the world's best pizza,
24 I want my money back, I want more spice" or whatever.

14:27:18 25 Puffery just acknowledges the obvious that

1 out in the world, when products are being promoted and
2 advertised, you can say things like that's the best darn
3 truck, you know, or something like that, and it's called
4 dealer talk. Right? And I think you use that phrase.
14:27:34 5 Or trade talk. That's number one.

6 So these are high-level promotional
7 materials. They're not specific to Hodell. They're
8 subject to the dealer talk exception.

9 And here's what they're also not specific
14:27:44 10 to. When I say they're not specific to Hodell, they're
11 not specific to taking B1 and stacking Radio Beacon on
12 top of it, and then stacking In-Flight Enterprise on top
13 of that.

14 Okay? But let's get into it. Let's look,
14:27:57 15 right, let's look at the language. There are only, like,
16 a couple of sentences.

17 Can you call up 314, please? Just, all
18 right, fine, let's scoop this for a second. This is not
19 the language at issue but -- actually back up, Bob.

14:28:14 20 Scoop the whole thing so they can see what this document
21 is. That's right. That's right. Okay. That's better.

22 See, it says SAP Business One Brief. Like
23 I said, it's not a letter to Hodell, all right. First
24 sentence, "Running a successful small or midsize
14:28:31 25 business, SMB, is more challenging than ever. With

1 buyers spending down and the markets at large playing
2 wait and see, many small businesses have hit a plateau,"
3 et cetera.

4 You can tell if Hodell ever got this thing
14:28:46 5 and if they ever read it like they say that they did that
6 that when you pick it up, it says Business One Brief,
7 read the first couple sentences, you know what you're
8 looking at. All right? It's a piece of promotional
9 material.

14:28:56 10 But go to the sentence that they're
11 challenging, the first, it's on the next page, and this
12 sentence is repeated in 617, or something really close.

13 Blow up the highlighted. And then go to
14 the second sentence. "The solution helps emerging
14:29:12 15 businesses." Can you underline that? That's perfect.
16 The green.

17 "The solution helps emerging businesses
18 from those with 10 to several hundred employees to
19 streamline their operational and managerial processes."

14:29:25 20 That's true. We know it's true. This is a
21 very dynamic, successful product. We got 40 or 50,000
22 customers. I just read off from Joe's cheat sheet that
23 he gave me how successful that it's been, how many of
24 them have way more users and, likewise, employees than
14:29:47 25 Hodell.

1 The idea that that's a fraud -- and
2 remember. Every time this comes up, do you ever notice
3 this, that like the Business One Brief is a couple pages
4 long, single-spaced, and it comes up pre-highlighted with
14:30:01 5 the language underlined as if that's how it existed in
6 the world. It doesn't.

7 But the idea that, oh, yeah, that's a
8 fraud, is ridiculous. This product works. It's worked
9 for companies with lots more employees than Hodell. Some
14:30:16 10 of them, lots of them, have several hundred employees.
11 That statement is accurate. Okay.

12 What Hodell is really saying is it didn't
13 work for them. Right? They had B1 and put Radio Beacon
14 on top and the In-Flight Enterprise. We don't agree with
14:30:32 15 that. We think it did work and we think they should have
16 stuck with it. In-Flight was the problem, et cetera.

17 But their point is "It didn't work for me."
18 And then, fine, go back to the language. Does it say
19 that this is a guarantee, it's going to work for every
14:30:45 20 single company, it's guaranteed?

21 It totally doesn't say that.

22 And here's another related issue. There's
23 no evidence that got put in this case that this is
24 untrue. We had this big case that went two weeks and a
14:31:01 25 couple days. They were throwing stuff everywhere on the

1 wall. Right? This was not the focus of the case. And
2 even when it was, they were basically suggesting it
3 didn't work for Hodell.

4 But think about this: They were not
14:31:15 5 putting in evidence that it didn't work for companies
6 from one to several hundred employees. They didn't do
7 the investigation of several -- like, if you want to
8 prove that this is an untrue statement, it's not just it
9 didn't work for one company that stacked an IFE on top of
14:31:30 10 something, you need to bring in an expert and say it
11 doesn't work, it can't work for companies with one to
12 several hundred employees.

13 Even Mr. Guembel, whose testimony I think
14 should be totally disregarded, he doesn't even say that.
14:31:41 15 He does not deny that this product could work for
16 companies with several hundred employees. Doesn't deny
17 it. And the record evidence makes it impossible to deny.

18 Very quickly, look at 617. There's another
19 statement in here by the way, it says one to 500. Same
14:32:01 20 deal. Right? Lots of companies with 500 employees B1
21 worked for.

22 Hodell's wrong that it didn't work for
23 them, but if they want to say that it didn't work for
24 them, it just didn't work for them, okay.

14:32:14 25 This is from -- this is the second document

1 that they're saying that we defrauded them with. Okay?
2 This thing's from 2003. The other one was from 2003,
3 also. This is someone from biz2bizmarketing writing to
4 Otto in October 1st of 2003 attaching this piece of
14:32:37 5 promotional literature.

6 Go to the next page, please. Look at the
7 top, this isn't even the same product. So this case is
8 going down, down, down.

9 We're down to two documents. We looked at
14:32:55 10 314. There's, like, two sentences in that, and then they
11 go, "Yeah, put 617 up on the board, we want to say that's
12 fraud, too." 617 was Penelope Vitantonio's company. She
13 was at American Express. This was the American Express
14 product. They weren't going to have Radio Beacon and
14:33:11 15 In-Flight. They had a totally different add-on that they
16 were selling, okay.

17 And I think, see all these little
18 highlights that we put in here? You'll get this document
19 and you can look through it. It says "Business One --
14:33:25 20 American Express Edition," repeatedly, like, I didn't
21 count them. It's probably ten times that's it's in
22 there.

23 And if you go to Page 6, it does have a
24 statement in it, but it's pretty much the same exact
14:33:38 25 statement that we saw from 314. I think if you got one

1 to several hundred employees, Business One is going to
2 work for you, or let's look at it. Doesn't guarantee it.
3 I don't want to overstate it.

4 The SAP -- there it is. "The SAP Business
14:33:56 5 One Solution effectively supports companies with as few
6 as ten and as many as several hundred employees."

7 I'd write that again because it's true.
8 Business One supports companies with as many as ten and
9 up to several hundred employees. That's -- that's
14:34:13 10 uncontroverted evidence in this case.

11 And just to be clear, now that the case has
12 kind of boiled down to this, Judge Nugent told -- talked
13 to you about standards of proof, right, and there's like
14 preponderance of evidence, and that's like if one side
14:34:32 15 has, like, slightly more evidence than the other, then
16 they win, even like 51% to 49%, right?

17 When you evaluate these documents and these
18 little sentences that are inside these documents that are
19 totally benign and totally true, in order to decide -- to
14:34:50 20 decide if maybe that's a misrepresentation, you have to
21 decide that there's been not just preponderance of
22 evidence, but clear and convincing evidence. Okay?
23 That's different.

24 Not a criminal trial, it's not beyond a
14:35:06 25 reasonable doubt, okay, but it's not a regular civil

1 trial either where it's just going like this
2 (indicating).

3 It's clear and convincing evidence. You
4 have to have a firm belief or conviction. And I don't
14:35:19 5 know how else to describe it, those are the exact words
6 that Judge Nugent used. But the point is, wow, they're
7 definitely going to lose. They got to prove that it's a
8 false statement, which it is not. We went through all
9 that.

14:35:35 10 And they have to prove that it was done --
11 they have to prove it was a false statement by clear and
12 convincing evidence. They have to prove that we made the
13 statement, and they have to prove this by clear and
14 convincing evidence, too, with the intent to mislead
14:35:52 15 them.

16 Where is the proof of that? We wanted this
17 to work. They pointed in our promotional stuff after
18 this about Hodell, where we were celebrating the sale.
19 Yeah, we were celebrating. We thought it would work. We
14:36:08 20 still think it does, et cetera, et cetera. But where is
21 the proof in this case that we intended to harm them? We
22 thought this was going to work. Okay?

23 Reasonable reliance. This is a big one,
24 okay. There's no way that a reasonable person in
14:36:26 25 Hodell's position -- and that's how you should look at

1 it -- can do what they're saying. When they had 617 up
2 during counsel's close, their argument was this sentence
3 is critical. It was like six pages of single-spaced
4 text. That sentence, "ten to several hundred," that's
14:36:46 5 the one that was critical as if that's the only thing
6 that they ever got and that's the only thing they ever
7 did and they made their decision.

8 That's not reasonable. If you take what
9 they're saying to be true, you can't go out in the world
14:36:57 10 and be a company like Hodell and be blind to everything
11 like this Radio Beacon thing, almost got you in
12 litigation and this massive In-Flight and all sorts of
13 other things and their massive transaction volumes,
14 they're going to talk about that and go, "No, no, I saw
14:37:12 15 that sentence and I'm justifiably relying on that. I'm
16 settled."

17 They know ERP, right? They had FACTS
18 before that almost got them in litigation. They know
19 that "employees" doesn't equal "users." That issue
14:37:31 20 shouldn't really be alive in the case any more, okay?

21 Kevin Reidl testified that when they had
22 FACTS, right, they had 160 employees. How many users?
23 I'll show it to you in a second. They had a hundred.
24 Okay. So Hodell knew "employees" does not equal "users."
14:37:49 25 And that really matters.

1 Greg did a good job of this in the opening,
2 making sure you understood. When you buy software, you
3 pay per user. You pay per license, right? So if you're
4 a thrifty customer -- and we know that Hodell's, like,
14:38:04 5 ultra thrifty, they don't want to buy any more users than
6 they have to.

7 Remember, Dan Kraus talked about that, he
8 had that painting analogy, like, you run a painting
9 company, you got painters out there painting houses or
14:38:17 10 whatever, they're definitely working but they're not
11 necessarily going to be computers users at all. They're
12 out in the field doing their work.

13 So it's a pretty big painting company and
14 they have an ERP solution like Business One or one of
14:38:29 15 these other ones, they're not going to buy a user license
16 for every single one of these guys who doesn't need one.

17 And the same was true for Hodell. Reidl,
18 Kevin admitted on -- can you call that up, actually? Did
19 I skip over it?

14:38:51 20 "Yeah, back in '04 when they were on FACTS
21 they had about 160 employees. That's right. And you had
22 about a hundred users? That's right. So two-thirds were
23 actually users? That's right."

24 So we can stop with the idea that when you
14:39:07 25 see the word "employee" -- first off, it doesn't matter

1 anyway. You could substitute the word "users" for those
2 couple of sentences, and when you go back to several
3 hundred, sure, works for several hundred users.

4 But it didn't say "users" and they don't
14:39:27 5 have a single document, a single document in this case
6 that says "users." There's no such thing.

7 One point. And I'm going to dwell on this
8 later, but Greg will get mad at me if I don't mention
9 this. Both of those documents, 314 and 617, they're from
14:39:48 10 2003.

11 Okay. Hodel knew -- and we'll talk about
12 this in a little bit -- that the numbers for B1
13 were -- well, put it this way, those two documents were
14 from '03. When did they sign the license agreement?
14:40:04 15 '05, okay. December, '05. So when you think about how,
16 you know, do we have clear and convincing evidence that
17 it was justifiable for them to rely on those two little
18 teeny, tiny sentences, right, you need to keep in mind
19 before you get a firm conviction -- and you cannot --
14:40:22 20 that that was justifiable, but you need to keep in mind
21 that they're talking about things that are back from '03
22 in connection with a decision they made in '05.

23 Okay. And we're going to talk about that,
24 there were materials out there in the world by '04 and
14:40:39 25 '05 that had lower numbers in there. IBIS and LSi knew

1 all about that, and so did Hodell because, remember,
2 Otto, right, there was that Exhibit 5.

3 You remember Exhibit 5? You probably
4 don't. Exhibit 5 was a magazine article, okay, and it
14:40:54 5 had lower B1 numbers in it. And in his deposition Otto
6 admitted, "Hey, I had Exhibit 5 and those lower numbers
7 before this." Okay. And then when he came in here in
8 court, he said "I made a mistake. I did not have Exhibit
9 5 before I signed the license agreement. I found it
14:41:14 10 afterwards."

11 Okay. And he said, "Look, if you flip
12 through it and you look at the fine print, at the very
13 end of it there's a 2007 print date." And his point was
14 "I couldn't have had it in 2005 because this thing got
14:41:29 15 printed in 2007. I must have looked at this after
16 go-live," right? That's not illogical, but it's beside
17 the point.

18 And Greg did a really good job of making
19 this clear to you, you might not remember it, but this is
14:41:42 20 exactly what happened. Otto then admitted that at his
21 deposition, before Greg showed him Exhibit 5, Otto
22 admitted no less than three times in his deposition that
23 Hodell knew before it signed the license agreement that
24 the numbers were coming down somewhat.

14:42:02 25 I'm going to talk in a minute about how

1 that was happening and why, avoiding competition with
2 All-In-One and et cetera, but again clear and convincing
3 evidence. They got all these elements. It's got to be
4 false. It had to have intent to mislead. There's got to
14:42:19 5 be justifiable reliance.

6 Whoa. What are they relying on? Two
7 documents from 2003 -- they're coming up on now on three
8 years old -- when they knew there's obviously lots of
9 other 2004 documents out there and 2005 documents, and
14:42:32 10 I'll talk about those, and they had lower number in them,
11 but they admitted that they knew. You can't -- that's
12 the end of that.

13 Performance tests. Remember the
14 demonstrative that had the blue on it? Right? That's
14:42:48 15 misleading. Okay. That document's not complete.

16 SAP conducted performance tests that
17 support the numbers that are at issue in this case.
18 Okay? I'm going to go through just a couple of them.

19 Bob, can you call up 122? We'll try and
14:43:09 20 show you guys the cover sheet. You might remember this.
21 No, I'm sorry, that's right, and you got to rotate it.
22 Gives me a break.

23 This is August, 2004, right? SAP B1 sizing
24 guide.

14:43:25 25 Can you go to the highlighted sections,

1 please? So it's small, medium and large configurations.
2 Notice the large configurations for purposes of this test
3 in, what was it, July, August, 2004? Do I have these in
4 right order?

14:43:43 5 I'm doing it backwards, sorry. Can you
6 call up 453?

7 Sorry. I was tired last night and I had
8 them in the wrong order.

9 So they're very similar, but I think it's
14:44:03 10 important for you to see them chronologically. This is
11 July, '04, SAP Business One sizing guide.

12 Next page. Same idea. They're testing out
13 the software. Right? And trying to determine, hey, if
14 you're going to put stress on it, how much hardware do
14:44:18 15 you need, how big should your servers be, and stuff like
16 that.

17 So they split them into three groups,
18 small, medium and large. So go -- keep going. I think I
19 have these pages right. Their large configuration, like
14:44:33 20 I said, was 150 users, and here's all the hardware that
21 you need. Right. Which by the way, tells you that we
22 expect it will work for 150 users or we wouldn't tell you
23 what kind of hardware to use with 150 users, but keep
24 going. There's some data. There you go.

14:44:48 25 Here's the report. Time-wise most actions

1 took less than one second. That's a big success. There
2 were 150 users, and they ran 20,000 transactions.

3 Okay. Now, I think that's the last
4 reference in this. All right.

14:45:04 5 So go now to the one we were just looking
6 at, 122. It's kind of interesting. This is a month
7 later. Let's scroll through this. It has the small,
8 medium and large. Let's go to the first highlighted
9 section, Bob.

14:45:19 10 Right. So there's 20, 60 and then 150
11 users. It's the same test, right? You can see it's
12 20,041 transactions. Right? If you get a little bit
13 more detail, there were a couple of them that were
14 longer, but this is a robust test. I mean, they're
14:45:38 15 testing 150 users and they're doing 20,000 transactions,
16 but go to the next -- fine, stop.

17 In August, when they ran the test, they ran
18 some bigger ones. They ran tests with 300 users and then
19 they ran tests with 500 users. And you can see the
14:45:54 20 transaction times, they're relatively low. And they
21 ran -- they didn't -- they didn't crank this thing to see
22 if it could go a hundred miles an hour, but they're
23 running thousands of transactions through.

24 And then look, there's something else I saw
14:46:10 25 the other day I think is interesting. Then they went out

1 into the field and they're talking to customers, and this
2 is the information they've collected based on their field
3 experience in '04. And if you look, the items, that's
4 like the SKUs, that's relatively low compared, right, to
14:46:31 5 Hodell.

6 But we heard the testimony, you look at
7 everything. It's not all driven by SKUs, it's how many
8 products do you have and how many people do you buy them
9 from and how many customers do you have and how many
14:46:42 10 warehouses do you have. It's all of those things, so
11 it's kind of almost like add up all those numbers and
12 look at it then.

13 And when you do that here, this, this is
14 80,000 to 90,000 customers. The users are there, 70 to a
14:46:55 15 hundred, with a thousand accounts and a hundred
16 warehouses.

17 And go, look how many transactions they
18 ran. Annually, these figures exceed Hodell's numbers,
19 400,000, 52, 12 and 380,000. Those are big numbers.

14:47:14 20 So when you, you know, when Hodell holds up
21 that demonstrative that they're marking with their little
22 pen, they're not including this stuff. So I don't know
23 why they're going through that exercise.

24 A couple of things. Hodell focuses on the
14:47:30 25 fact that, "Oh, when you did these tests" -- and this is

1 more -- less from argument but more from the questions
2 that they asked witnesses, that "When you did these
3 tests, you didn't test them at our volumes, right, our
4 exact volumes."

14:47:47 5 And you can't do that. Right? Every
6 customer is different. There's not going to be a test
7 where you kind of perfectly match the customer, but I
8 thought the testimony on this -- who was it? The one who
9 said go 60 miles an hour.

14:48:09 10 MR. STAR: Guagenti.

11 MR. MILLER: Joe Guagenti.

12 He said if you test the car and it's tested
13 that it can go 60, that doesn't mean that it can't go 80.
14 But what it also means -- and we're going to talk about
14:48:21 15 this in a couple minutes -- if you're Hodell and you're
16 going to stack Radio Beacon and this giant enterprise on
17 top of that, you need to remember, hey, this thing's only
18 been tested to go 60.

19 And these test results, the testimony is,
14:48:37 20 they went to Hodell's guys, okay, IBIS and LSi and their
21 training and all the stuff they went through, they got
22 all that stuff. Okay? That's performance tests.

23 Your Honor, I've got a ways to go. If we
24 can, I would imagine the jury might want five minutes.

14:49:03 25 THE COURT: That's fine.

1 MR. MILLER: I don't need a lot of time.

2 THE COURT: Okay.

3 MR. MILLER: Whatever you guys want.

4 THE COURT: Is ten minutes good for

14:49:09 5 everybody?

6 MR. MILLER: Works for me.

7 THE COURT: If so, keep in mind the

8 admonition.

9 We will wait for our little general -- our

14:49:17 10 young general, I should say. Not little general. I

11 think that's what we should start calling him, don't you?

12 He'd like that.

13 His mother's not too happy. He wants to

14 come back tomorrow, too. Of course, I gave him the go

14:49:32 15 ahead.

16 (Jury out).

17 (Proceedings resumed in presence of the

18 jury as follows:)

19 THE COURT: Be seated, folks, please.

15:04:51 20 This is getting a little exciting. One of

21 my daughters is here. She came from New York, and she's

22 waiting for me to take her home. And another one of my

23 kids took the red eye last night from Los Angeles and

24 guess who rode on the plane with her?

15:05:08 25 THE JURORS: Dwayne Wade.

1 THE COURT: Oh, you're so far off. LeBron.

2 A JUROR: Oh.

3 THE COURT: Wouldn't you think he would
4 have his own plane or something? He took the red eye on
15:05:23 5 Spirit Air or something like that, and then he actually
6 with his kids picked up his bags at the baggage thing and
7 everything, but he did have a driver. Of course, my
8 daughter did, too.

9 (Laughter)

15:05:43 10 THE COURT: 5:45 a.m., I'll have you know.
11 Very well paid driver, though. That was the difference.
12 You may continue.

13 MR. MILLER: Thank you, Your Honor.

14 Okay. Next chapter, we'll talk about
15:05:58 15 add-ons and transaction volume a little bit. They
16 matter. Okay.

17 Stacking stuff on top of B1. What you put
18 up there, matters. And transaction volumes matter. And
19 Hodell knew that, and so did Dale and Dan.

15:06:15 20 This case, like I said, it's strange. I'm
21 going to go right to just a couple of points and probably
22 move through these next couple of chapters quickly.

23 But go, please, to 291, Bob.

24 We've seen this. Right? That's this.

15:06:33 25 Sorry. That's this, development agreement between Hodell

1 and IBIS and LSi. The project description is an add-on.
2 This is what they're doing. They're going to build this
3 thing that's bigger than B1, okay. "The development of
4 IBIS's In-Flight Enterprise application." I know that
15:06:52 5 seems really simple, but it's also really important.
6 It's funny. You can litigate a case and finally go back
7 and look at the project description and, like, yeah,
8 that's what they're doing, they're taking B1 and stacking
9 this big whopper on top of it.

15:07:05 10 And Hodell knows about add-ons, and this is
11 why some of the story I was telling you before becomes
12 important and relevant. They had FACTS. They have been
13 on ERP way longer than most companies. They get this.
14 They know what an add-on is.

15:07:18 15 So then what, right? Transaction volumes;
16 they matter, too, okay. Transaction volumes for Hodell
17 were unusual. Hodell's in the fastener business. Right?
18 They have, we've heard this over and over, they've got
19 lots of little parts, little twists and bolts and nuts
15:07:38 20 and stuff, lots of those. They apparently have lots of
21 customers and lots of vendors where they get these
22 things. They have a very unusual transaction volume.
23 Okay?

24 Who knows best about their transaction
15:07:50 25 volume? Well, Dale probably knows more than anyone on

1 the face of the earth because he's an IT guy, and he's
2 married to them, or he was until they broke up. I don't
3 know where they end up. Maybe they're divorced now. I
4 don't know. But they're not together, put it that way.

15:08:12 5 Dale knew the volumes. He knew -- he
6 worked with their company since the late eighties all the
7 way up until whenever he walked off from LSi in 2006. He
8 knows their volumes better than anyone on the face of the
9 earth because he knows how they matter.

15:08:29 10 And Hodell knows their volume, and they're
11 second just to Dale, right, because they know how many
12 parts they got and they know what business they're in,
13 and they've been on ERP before.

14 And look at 294 because remember, it was
15:08:41 15 the conversation about, hey, how do you sell this stuff,
16 right, because SAP has -- it's got three basic products.
17 It's got the ECC ERP for the big companies, the Fortune
18 100, Fortune 500 companies, right? They buy that from
19 SAP direct, right? And then there's this All-In-One
15:09:00 20 product, which is basically direct, also, and that's for
21 the mid market, and we'll talk about that in a minute.
22 And then, right, there's B1, right?

23 Well, then of course, then there's going to
24 Staples or going to Best Buy and pulling something off
15:09:16 25 the shelf because you're even a smaller company, and as a

1 small company, you're working out of a garage or
2 something.

3 But B1, the software in that space,
4 remember Dan Kraus explained, a couple witnesses did, but
15:09:28 5 I thought Dan did the best job of it because remember, he
6 outside used to work at Great Plains and they got picked
7 up by Microsoft and he sold products in this space.

8 Products in this space get sold not by
9 companies direct, like SAP sells its ECC product; not by
15:09:42 10 going to Staples and pulling something off the shelf.
11 They're sold by dealers. And how come? And he
12 explained. The dealers are eyeball-to-eyeball. They
13 know what the customers' requirements are. They know how
14 big is this whopper of an add-on that we're going to add?
15:09:56 15 What are your requirements? How big are your
16 transactions? How many -- they know everything about the
17 company.

18 He even explained that in his experience,
19 not uncommonly, a dealer just like we have here, has
15:10:08 20 previously been involved with an implementation of a
21 prior ERP solution.

22 They're the ones that are responsible for
23 communicating whether something is a good fit for them.
24 The seller, right, the manufacturer, we don't know what's
15:10:22 25 going on out there. We just, we have our software, and

1 we sell it through the dealers, and we have a recruiting
2 process.

3 And you remember Dan Lowery went through
4 it. And it was a badge of honor to make it and all that,
15:10:34 5 but when it gets down to brass tacks, and they're trying
6 to decide, hey, what about the add-on, and what about,
7 you know, the volumes of the company, that's the dealer
8 and the customer.

9 So let's look at that. Look at -- that was
15:10:48 10 all preliminary to this. Hummina, hummina.

11 So this is Dale. This is a multi-page
12 document, right, and these are hard, as counsel would say
13 they're hard to kind of navigate, but this is a February
14 27th -- actually you know what, Bob? Can you go to the
15:11:05 15 bottom of this? Let's make sure the jury totally
16 understands this.

17 So Dan Lowery writes to Ralf Mehnert-Meland
18 on February 27th, '06. They're having some performance
19 problems in connection with the implementation, basically
15:11:22 20 of an IFE, but they're using B1 also, at Hodell.

21 February 27th, 2006 is after the license agreement sale,
22 right? Because the license agreement sale was in
23 December of '05. This is three months later. They're
24 having some problems.

15:11:42 25 Lowery writes to SAP, says, "You're going

1 to hear from Dale Van Leeuwen."

2 Scroll up. Dale's response. Keep going,
3 keep going. One more. Stop.

4 This is the same date. Dale responds, and
15:11:58 5 he's explaining some of the things, some of the issues
6 that they're having. And look at this, "To assist you in
7 understanding the environment we're deploying in, I
8 provide the following." A bunch of things about
9 hardware, and then the last item, "The database has
15:12:13 10 approximately 150,000 SKUs, 20,000 customers, 7500
11 vendors."

12 This is the first time Hodell -- any
13 significant volume information from Hodell was ever given
14 to SAP. It's three months after the sale. And agency is
15:12:31 15 out of the case. Okay? So Dale is not our agent and Dan
16 is not our agent. That's done. It's not in the case.

17 So what is SAP now? It doesn't know
18 anything about volumes of any significance until it gets
19 this. Okay. And there hasn't been -- Hodell knows full
15:12:48 20 well what our position is on this. They've had seven
21 years to find earlier proof that SAP, not that it would
22 have mattered, but they don't have any earlier proof
23 because there isn't any. Okay?

24 And just to kind of confirm some of this,
15:13:02 25 take a look at -- oh, you know what? I'll come back to

1 that.

2 Look at 167. This is a little bit out of
3 order. Like I said, it's not perfect chronologic order.
4 This is after go-live. This is six months after go-live.
15:13:20 5 This is Eddy Neveux, one of the B1 solution architects.
6 He's writing internally about the solution. Look at the
7 second line.

8 The company data file is 43 gig, analog
9 file is 93 gig. Yes, gig, exclamation point. So we
15:13:41 10 didn't get anything that was -- with any significance
11 until February 27th, '06.

12 And then here we are, whatever this is, a
13 year and a half later, six months after go-live, we're
14 still learning. These guys are out here. They're doing
15:13:57 15 something not only do we not know about, but the solution
16 architects are using exclamation points in reference to
17 gigs.

18 I'm going to skip the next part, Bob, but
19 remember on the add-on thing, that was in the contract,
15:14:11 20 right? We don't have -- I don't want to waste our time
21 going through it again, but all the contracts that we
22 signed, this one, this one and this one say, oh, yeah,
23 when it comes to add-on, we have no responsibility.

24 So let me try without talking faster, to
15:14:28 25 move faster.

1 There's only one verbal representation
2 issue left in the case. And it's what -- the allegation
3 is that Penny said something to Otto, and I'll tell you
4 right now Otto says that Penny Vitantonio told him B1's
15:14:51 5 good for Hodell up to 300 to 400 to 500 users. She
6 didn't say that. Okay? And there's definitely not this
7 whole clear and convincing evidence thing where,
8 remember, it's got to be a false statement. She had to
9 intend to mislead him. He had to justifiably rely. And
15:15:12 10 then it kind of keeps going and there's proximate cause
11 and all that.

12 But let's, you know, I'm not asking you to
13 just hear my declaration sentence and go yeah, mine's
14 right. Let's look at it, all right. And by the way, we
15:15:29 15 heard a lot of allegations about what other people said.
16 It's not in the case anymore. Didn't work. Okay? We're
17 down to Penny. Otto and Penny. Otto says he talked to
18 Penny a bunch of times in 2003 and in early 2004, right?

19 And then we heard two-plus hours of closing
15:15:50 20 argument from counsel, and I had to ask Greg, "Hey, have
21 they even said anything about Penny?" Because I
22 remembered that they did. There was a couple references
23 to her notes, but this is a fraud trial.

24 If they're going to step up and say Penny
15:16:05 25 Vitantonio lied to Otto and she intended to mislead him

1 and Otto justifiably relied and all these damages are
2 proximately caused, they got to step up and do it, and
3 they kind of went around it.

4 And the reason is they know this part of
15:16:21 5 their case goes nowhere.

6 We took Otto's deposition, right? He had
7 very few details about this, when you'd expect him to
8 have more. But what do we know? He's a prolific
9 notetaker. You've seen his notes throughout the trial.
15:16:46 10 This is the guy when he goes to a meeting -- there's
11 different types of people.

12 You can sit around a business meeting,
13 there's six people, some people are just here, some
14 people are asleep, some people are notetakers. All
15:16:56 15 right.

16 Otto is obviously a notetaker. So we're
17 all over that. In this case, give us all your notes.
18 Okay. If Penny said this, and he had these conversations
19 with her, and it was as important as he says -- because
15:17:07 20 he was very clear they would not move forward unless he
21 was assured this was good for 300 or 400 or 500, I think
22 they move around a little bit on the numbers, but he's
23 clear about that part.

24 So we look at his notes. Well, there's
15:17:22 25 nothing in there about 300 or 400 or 500. In fact,

1 forget his notes. Right? Let's go bigger. Is there an
2 e-mail? Or maybe, like, a proposal or some contract or a
3 napkin or anything in the history of the universe that
4 corroborates what Mr. Reidl said that Penny said to him?
15:17:49 5 Look for a three with a zero and a zero in the context of
6 where, hey, if they're going to say this, they need clear
7 and convincing evidence. And there is not. We've
8 litigated the case, like I said, for years, and we don't
9 have that.

15:18:03 10 So what do we have? We have Penny's notes.
11 Penny's notes. She's a prolific notetaker, too. She
12 might be more prolific than Otto. So let's take a look
13 at what her notes say. She doesn't deny she talked to
14 Otto. And remember, by the way, she's not even talking
15:18:22 15 about she's not selling the same product.

16 This conversation was about Business One,
17 the American Express Edition. Otto thought it was too
18 expensive. He would only pay for half of that. He
19 wanted to pay 300,000 and double his money, et cetera, et
15:18:40 20 cetera. She's talking about a different product. Okay.
21 But we've been through that.

22 So let's look at her notes. Let's talk
23 about users. Oh, boy. If you look, just, hold on, right
24 there, 100 users on the left margin -- go to the next
15:19:02 25 one, please. That's fine. I know it says users.

1 Go to the next one, please. Some of these
2 don't highlight so we have to use an arrow. Okay? A
3 hundred users. I think this is -- you see 11/20 at the
4 top? Go to the next one. February 2nd, 100 users.
15:19:33 5 Okay?

6 Go to the next one. And by the way, I know
7 there was some testimony that there may have been some
8 exchanges between Otto and Penny about volumes, and
9 there's a note. I mean we saw a reference to that a
15:19:45 10 minute ago, and I can respond to that, but I want to
11 focus on users.

12 Plus, like I said, she's talking about
13 she's an American Express person. There's no evidence
14 that she's acting on our behalf. She's selling a
15:19:58 15 different product. But let's get down to what Otto said
16 she said about users. She said a hundred -- or he said a
17 hundred and she recorded it.

18 Go to the next one, please. That's it. I
19 think it's four.

15:20:13 20 She's got four times in four separate
21 conversations that she wrote down "100." Okay?

22 So put yourself in the spot you're in,
23 right? You guys get to decide this and you got to look
24 at everything and figure out, hey, what's the truth.

15:20:32 25 Well, Otto says this is what he remembers.

1 Penny totally remembers it differently. She says she
2 wouldn't have said that. She was very credible. And I
3 think she's more credible -- I think the evidence
4 suggests she's more credible than him, but that's a tough
15:20:48 5 call. Could go to the notes. His notes say nothing.
6 And her notes four times say a hundred users.

7 So if you're looking for the truth, the
8 truth is right there. I don't know what has made Otto
9 think or remember it in the way or testify the way he
15:21:10 10 had, but that's not what happened.

11 What happened, the truth is in these
12 documents. She didn't write a hundred so that I could
13 make this argument twelve years later. When they talked,
14 they talked about a hundred. You can tell. So that's
15:21:26 15 done. That issue's out of the case.

16 Oh, one other thing. She made the point
17 that if there was a bigger number discussed, she would
18 have written it down. That makes sense to me. It should
19 make sense to you.

15:21:46 20 She sells software. She gets paid on
21 commission. 300 users gives her more money. If he said
22 300 users, she's writing it down and that's how she
23 explained it. That's totally believable because that's
24 how it would go.

15:22:01 25 One other point. Otto's notes, right, he

1 doesn't have it. He doesn't have anything else having to
2 do with the Penny conversations that say 300 or 400 or
3 500. And I said, you know, that was like when I said,
4 "Go bigger. Look for contracts," but nothing.

15:22:19 5 But it's not even just with respect to the
6 conversation with Penny. In this whole case, in the
7 history of the universe with respect to this case, there
8 are no documents, none, that suggest that Hodell ever
9 said it needed 300, 400 or 500 or that SAP ever said
15:22:46 10 "Yeah, B1 is good for you, Hodell, at 300, 400 or 500."
11 None. Okay?

12 That tells you something. It didn't
13 happen, and there's no clear and convincing evidence.
14 That's for sure.

15:22:59 15 Bob, I want to skip number ten, which is
16 about Dale doing a terrible job drilling down. And go on
17 to a little piece -- sorry, I'm going to try and move
18 through this quickly.

19 SAP knew very little about the Hodell deal.
15:23:20 20 I don't think I've made this point yet. You've heard it
21 before, but it is really important. There was zero
22 direct contact with SAP and Hodell prior to go-live.
23 Everybody knows that. It's not contested in this case so
24 I don't want -- and sometimes you can go through a whole
15:23:38 25 trial, and we didn't make an important point to you.

1 There's no direct contact.

2 The first time SAP heard about Hodell,
3 okay, in any formal way was November, 2004, just a month
4 before they signed up here. Call up Exhibit 40, please.
15:24:01 5 This was an e-mail from Lowery to Dan Kraus. Look at
6 this. That's perfect.

7 November 3rd, 2004. Lowery to Kraus.

8 "Dan, IBIS -- LSi/IBIS has an opportunity with
9 Hodell-Natco, an existing IBIS fastener customer using
15:24:28 10 FACTS software." And he goes on and on. This is an
11 introductory note. You can tell by looking at it. It's
12 not like following up on our conversations from before
13 about Hodell. You can tell by looking at it. "Hey, we
14 got an opportunity with this company called Hodell." If
15:24:43 15 he already knew it was an existing fastener customer,
16 that would be weird to write that.

17 He's introducing them to him, and Dan came
18 in here and told us, "Yeah. Yeah. Here's what happened.
19 I got that e-mail, and I talked to Dan for about a month,
15:24:56 20 and we got settled on a price. It was tentative. And he
21 wanted me to hold the price for a year."

22 Remember, I was going through with Dan and
23 I was literally doing this, okay? So there's the history
24 of the universe.

15:25:09 25 And then November, '04, they agree

1 tentatively on a price, and then this thing goes
2 basically dark for SAP for a year.

3 So go to 748, please. Here's Dan writing
4 internally to people at SAP. This thing's gone active
15:25:32 5 again. The year has gone by. It's October of 2005.

6 The challenge on this -- by the way, below
7 this is Exhibit 40 in the chain. So in November, he's
8 forwarding an e-mail from a year ago. And look at what
9 he says to his internal colleagues. "I've gotten no
15:25:49 10 update on this in a year."

11 So only reason I'm showing you that is so
12 you get it. SAP is not like heavily involved. The
13 dealers do that. They deal with the add-ons and all that
14 other stuff, the transaction volumes.

15:26:02 15 SAP got the introductory thing, squared
16 away on a price tentatively, then a year later, it gets
17 active. So what happens? SAP honors the price that they
18 talked about a year before, and then the license
19 agreement gets signed right here. Okay?

15:26:20 20 But consistent to what I'm telling you
21 prior to the sale, we were in the dark about In-Flight
22 and the details associated with it. That's what really
23 matters, and the transaction volumes and the details
24 associated with that. And there's proof of that in the
15:26:41 25 case.

1 Like I said, we can't do everything, but
2 here's some choice ones. Look, please, to 788. This is
3 a three-chain e-mail. Start at the bottom. Perfect,
4 Bob. Perfect.

15:26:56 5 So Lowery writes Meland, September 26th,
6 '05. So this is -- this is during that kind of quiet
7 period, right, because it's before the October thing
8 where Dan Kraus says, "It's been quiet for a year." It's
9 a month or so before, and Lowery says, "Hey, are you
15:27:16 10 aware of our In-Flight development effort?" And go up to
11 the next exchange.

12 And Ralf responds right away, "In very
13 general terms, I understand it is for the fastener
14 industry. Is that even right? Can we talk?"

15:27:33 15 And look up top. Look at what Lowery does.
16 Lowery writes to Dale. This is Dale in the upper
17 right-hand corner. See that little tiny DV? DV is Dale
18 Van Leeuwen, he actually confirmed that in this trial,
19 not that anybody else thinks it's anybody else anyway.

15:27:56 20 See -- "Hey," Dan to Dale, "see, no one
21 knows about it. If you have time, can you meet with him
22 on the phone? We're about to sign a license agreement,
23 but we don't know what's going on. Not that that's
24 unusual, but we don't know what's going on."

15:28:13 25 And we looked at 294, right? Just very

1 quickly. If you can call that up.

2 Go right to the volume part, Bob. I think
3 it's quick. Next page or whatever it is. There you go.
4 We already looked at this. This is three months after
15:28:29 5 the sale when we got the volumes, right? And then look
6 at 785. This is -- this is more of just piling it on so
7 you get it.

8 Scoop the top. Solution architect for B1.
9 He's writing to Ralf, "Hey, Ralf," and remember this is
15:28:55 10 when the performance problems started and they came back
11 to us. "Hey, we're having some issues." And Dan Kraus
12 explained we never knew those issues got to be a problem,
13 and I'm going to talk about that in a minute. But, we
14 gave them some assistance, told them to make sure they
15:29:10 15 did some, like, hard core testing. They said they would.
16 Then they disappeared, and we didn't hear again from them
17 until after go-live.

18 But the point of this is, "Hey, Ralf, they
19 gave us what the volume of data they're using is."

15:30:45 20 It's -- and this is a quote from that February 27th, '06
21 e-mail, this is from Dale as to a week, a week and a half
22 ago, this is internal SAP. They're trying to figure out
23 what's going on in their heads, what do they know and not
24 know.

15:30:46 25 There's a story being told here in the way

1 of this e-mail, and they didn't have those transaction
2 volumes. They're even internally acknowledging that we
3 just got it. Okay?

4 Very quickly go back to 294. And I've
15:30:46 5 already made the point that the people who know about the
6 add-ons and the transaction volumes are Hodell and their
7 guy Dale, but I just want you to see this, too. We were
8 candid.

9 Scoop that whole thing, Bob, so we can pick
15:30:46 10 the date up.

11 Right after they gave us the transaction
12 volumes, we wrote to them, we know they're having some
13 performance issues. Hey, look, we're looking into this.
14 "We've had some reports of issues in performance with
15:30:46 15 large data sets in the Business One product."

16 So they tell us on February 27th, three
17 months after the sale, they got a very unusual customer,
18 little parts and all this kind of stuff, and we say,
19 "Whoa, just so you know, we've had some issues with large
15:30:46 20 data sets," right to them, right to their guy, okay?

21 And look at 121. This is all around the
22 same time.

23 Remember I was just saying like this
24 performance issue came up and we told them to test, like,
15:30:54 25 you know, before you go live, do some hard core testing,

1 get a bunch of users pounding away on this thing, see if
2 it can handle it.

3 These are internal IBIS/LSi notes. They're
4 dated, like, March 16th. The team had a call on the
15:31:12 5 15th. They are aware of response issues. They have some
6 improvements in the works. That's consistent with what
7 I'm telling you. SAP is telling them, look, this is
8 something to work on.

9 We also told them, hey, our satisfactory
15:31:31 10 testing results are these. So we're telling them "The
11 volumes you have are lower than a lot of our test
12 results." I don't think this is a full summary like we
13 did in this case about going out and finding everything
14 that we could find. Probably even more out there. I
15:31:46 15 just found what we could.

16 But the point is when we heard about the
17 volumes on February 27th, passed right along with them,
18 "Hey, if you're having trouble, you need to know. We've
19 had issues with large data sets."

15:31:59 20 And then in the conference call, when
21 performance testing comes up, we say, "Look, our levels
22 were these. Your levels are higher. You're trying to go
23 80 with that thing on the top. You need to take that
24 into consideration."

15:32:13 25 So let's keep moving. This one, this one's

1 hysterical. This project -- okay, when I say "project,"
2 it's In-Flight -- was a disaster. And IBIS/LSi hid that
3 not just from SAP. They hid it from Hodell, too. So
4 this marriage that they had going was a mess.

15:32:37 5 What do we know? Dale, he was the captain
6 of the ship for this gigantic In-Flight thing that was
7 going to be built. And the project took, what, 27 months
8 because they signed this -- the project went all of '05,
9 all of '06 and went live in '07, so twelve plus twelve
15:33:02 10 plus three, 27 months, right?

11 Dale, luckily -- everyone is happy that he
12 beat cancer, but he got very sick right after the
13 development agreement was signed and he testified right
14 here in the courtroom for the first eleven months of the
15:33:16 15 project, he's out. He's doing a little bit, but he's not
16 the captain of the ship. He wasn't on the ship. He was
17 home sick.

18 And then he came back in late '05 and then
19 he quit in May of '06. So what's that, six months? So
15:33:36 20 the captain of the ship for this project, it's super
21 ambitious, and they're trying to double their money and
22 so on. He was only there for six of the 27 months.

23 So then Dan Lowery steps in and Jon
24 Woodrum, and things get worse, right? I'm going to try
15:33:54 25 and move through this quickly. Look at 214.

1 These are samples. There are gobs of these
2 e-mails out there. This is Woodrum in May of '05, but
3 "Dale's not really around. We got to trim it down to
4 that which we can realistically accomplish. I don't want
15:34:17 5 to see us have a train wreck. Biting off more than we
6 can chew."

7 He's reporting to Lowery the project's not
8 doing well. So skip to 139, please.

9 Check this out. I think you picked this up
15:34:32 10 when I cross-examined Dan Lowery. Go to the bottom.
11 Yep. Move up a little so we can see it.

12 So Dan Lowery is going to write to Dale
13 Van Leeuwen and Jon Woodrum. So Dale's getting e-mails
14 at this point, although he's not on the ship. "Hey, I
15:34:50 15 got to go get that next 60 grand from Otto because we
16 only got 60 so far," and this is the one, by the way, if
17 you read the development agreement, if Otto didn't like
18 how things were going, actually it was either the second
19 or the third project -- payment. I'm not even sure, I'm
15:35:05 20 going to leave that to the side, but they're trying to
21 get 60 grand from Otto, okay?

22 Hey, how do I do it? Let's try to get him
23 to sign a document. Okay?

24 Look what Jon Woodrum says in response.
15:35:19 25 He's a senior guy. Okay? There it is, May 11th. So a

1 couple days later. Scroll down. There's a highlighted
2 part. Here we go.

3 "We've been unrealistic thinking Dale could
4 have this ready. Specs will be the success in advance
15:35:38 5 and at sign-off. I'm serious when I say that the
6 enhancements are somewhat described in the SAP -- if the
7 enhancements are what's described, we're looking at
8 10,000 hours and five years, not 2800 hours this year."

9 But he doesn't copy Dale. Okay?

15:35:57 10 Go down further. Scroll up. Wait, no, no.
11 Sorry, go back to where you were. I think we have kind
12 of like the wrong thing. Hang on. Whoa. Highlight the
13 whole thing, please.

14 Okay. We can just -- I'm going to let you
15:36:27 15 guys look at 139. Okay? He doesn't copy Dale. He's
16 critical of Dale. Okay? And he's critical of the
17 project.

18 Go to the top. Okay. Yeah, that's fine.

19 So you got Lowery says, "How do we get
15:36:47 20 money from Otto?" Woodrum writes back to Lowery, doesn't
21 copy Dale, tells Lowery that Dale's an issue and says
22 "The project is a big problem and going to take 10,000
23 hours and five years, not 2800 hours and this year."

24 So what does Dan Lowery do? Go to 41. He
15:37:06 25 goes and gets the money. He totally disregards what

1 Woodrum said and goes and gets the money from Otto.

2 He writes him this letter May 17th. Look
3 what he says. I'm going to try and move fast. The
4 second highlighted section, "We demonstrated a thorough
15:37:21 5 execution and a dedication to the project that shows us
6 to be on target for our projection."

7 They're not on target for their
8 projections. Jon Woodrum, just basically taking over for
9 Dale, just told them they're totally behind.

15:37:36 10 And then scroll down. There's another one.

11 "We see the strength of the tools that will
12 be made available to Hodel. Through this effort, we've
13 become even more excited over the solution."

14 That's not true. And then he collects 60
15:37:52 15 grand off the guy.

16 Look at 128. Dale and Woodrum, they don't
17 get along, okay? Woodrum writes to Lowery on August 1st,
18 '05. Blow up both those pieces. "Dale thinks I'm a
19 backstabber. I'm not going to assume he's my friend."

15:38:15 20 It's totally unprofessional stuff, but here's the main
21 point. "We shouldn't expect that he'll be staying with
22 the company a day beyond May, '06."

23 So LSi bought the IBIS company in May, '04.

24 Dale had a contract where he said, "I'll work -- I will
15:38:31 25 not leave for two years." And on August 1st, Woodrum's

1 telling Lowery, "That dude's out of here. He's leaving
2 the day, as soon as he can." Okay. And he says
3 something like it down here.

4 So Lowery is on notice. So go to the next
15:38:46 5 exhibit, because you would think they'll Hodell knew Dale
6 forever, they would want to know.

7 Look at 844, down at the bottom, first,
8 please. They don't tell Hodell. They find out on their
9 own, which must have been embarrassing, and they write to
15:39:13 10 him, "Hey," this is Kevin, "I found out Dale's leaving.
11 We're shocked. He was a major deciding factor."

12 So look what Dan says in response.

13 Go to the top. And mind you, to be clear,
14 this whole thing's got nothing to do with us. This is
15:39:33 15 all the project. What was the project? The project was
16 the development agreement. What's the development
17 agreement? It was building this massive IFE.

18 So when all this fur is flying and all
19 these lies are being -- all this stuff, it's got nothing
15:39:48 20 to do with us at all. We're not only blind to it, and we
21 don't know it's happening. It doesn't have anything to
22 do with us at all. Okay?

23 Look at this. "I first heard he was
24 leaving two weeks ago."

15:40:02 25 We first heard that he might leave in

1 August of '05. And sure he knew more. It was a
2 surprise, unexpected. And then he tells like a tall
3 tale. "He told me he was going to invest in real estate
4 and I started thinking maybe he would leave." Well,
15:40:16 5 maybe that even happened, but if you're going to start,
6 you know, telling them when it was, maybe you find your
7 way to telling them that you've known since August that
8 he was probably leaving the day he could.

9 And he goes on and tells him more stuff
15:40:29 10 that's obviously not true.

11 There are a series of exhibits. You guys
12 don't get to take notes. I'm not going to go through
13 them all. Woodrum can't look them in the eyes. Do you
14 remember that one, right? Oh, we've got to go to this.
15:40:45 15 I can't resist. 217. Bilas.

16 They bring in Bilas, he's going to replace
17 Dale, right? And Bilas does this big report. And
18 remember again, the report on IFE has nothing to do with
19 us and this is all stuff they don't talk about, right?

15:41:02 20 They just say, "Oh, we saw the sentence, we saw the
21 sentence in 314 about -- and we found that to be critical
22 to us."

23 Their people that they signed the
24 development agreement with and who they almost sued from
15:41:17 25 before, they're all mixed up in something that's not

1 going well. It's got nothing to do with us.

2 Bilas rips the project, okay. These things
3 here, A to J, like if you bring in a professional, that's
4 the project, like, these are the things. Here's what you
15:41:36 5 didn't do, A to J is, like, you didn't do anything.

6 Okay.

7 And what happens to Bilas? Right? He gets
8 canned. Lowery fires him.

9 Go to the next, what is it? 848. He calls
15:41:59 10 Otto and tells him finally we fired that guy. I don't
11 think he ever shared the Bilas report with him, but he
12 certainly fired him.

13 So now where? We know that the market was
14 going down, the target market for SAP B1 in '04 and '05.
15:42:18 15 And that was for two reasons. ECC was the big one,
16 Fortune 100, All-In-One's in the middle, right, and then
17 B1's at the bottom. B1 was so robust it was running into
18 All-In-One. Like, All-In-One salespeople at SAP are
19 saying, "Wait a minute, get these B1 people out of our
15:42:41 20 space. Okay. They're cutting into our sales."

21 And SAP makes more money selling
22 All-In-One. That's, like, a bigger thing. And they
23 began to put pressure and tension on the Business One
24 people to shrink what they were doing.

15:42:53 25 And then there were also, where we saw SAP

1 admit this to Hodell, there were some reports of some
2 issues with large data sets. Okay.

3 Ed Neveux admitted that. Dan Kraus
4 admitted that. We admitted that the day they told us
15:43:10 5 that they had a giant data set. Okay?

6 Hodell walks around like this is some
7 ominous -- that there's something more ominous about this
8 than there is. We have what we have. We've produced the
9 documents. There's some performance issues that had come
15:43:27 10 up in the past with large data sets. When you evaluate
11 this, how do you evaluate that? Well, with everything
12 else.

13 What else do we know? This is a hugely
14 successful product. You can't take that piece and go,
15:43:41 15 "Oh, that thing's a piece of junk." We have 50,000
16 customers. I don't have to go back to Joe's cheat sheet,
17 but we have lots of them with plenty more users than
18 Hodell. It's a thriving product. They should have stuck
19 with it and they'd be happy now.

15:43:54 20 A couple things. Remember the exhibits
21 that I shared with Dan Lowery? Try 428. This goes to
22 the last page. Actually went over this with two people,
23 with Lowery and Kraus.

24 Dan Kraus explained -- do you see that,
15:44:29 25 that 2005 thing? He called it public facing. This is a

1 public facing document.

2 "Dan, what did that mean? Well, it means
3 the dealers have this and they're allowed to do whatever
4 they want with it. It's on their websites. You can find
15:44:45 5 it on the Internet. Well, what is it?"

6 We'll go to the front. It's 2005, mind
7 you. It's a presentation on B1. Go to the next page.
8 And the numbers are lower. Right? It's ten to 200
9 employees; not 500. It's three to a hundred, okay?

15:45:05 10 Go just back out so we can see. And then
11 you see All-In-One. It's hard for you guys to read this.
12 Right here where my finger is, it says B1. And then
13 right here it's like All-In-One or something like that.
14 And this is the ECC project. This machine's resolution
15:45:23 15 doesn't pick that up. Okay. If you look at the hard
16 copy, you'll definitely see it.

17 But this is part of a license agreement.
18 It's available to the dealers and it's available to the
19 public. The dealers get this from the meetings where
15:45:34 20 they present this. I mean, you can find it on the
21 Internet. So look at the next one. 124.

22 Statement of Direction, early '05, the
23 dealers have this. What does it say about users? Pardon
24 me, about users or employees.

15:45:56 25 Go ahead. Open it. It's employees, not

1 users. There you go. Thank you, Bob.

2 Here's what we're going to do. We're going
3 to focus on the needs of ten to a hundred employees, but
4 they continue to meet the needs of bigger companies up to
15:46:20 5 250 by concentrating on ten to a hundred, we're going to
6 increase our market presence, penetration. Okay?

7 This came from Lowery. The dealer had
8 this. And it was, I think, what's the date of it? Go to
9 the front. Oh, yeah, this is the one from early '05.

15:46:41 10 Okay. Remember, it had all those dates, January, March
11 and then April. This is early '05.

12 So then look at 130. Also from Lowery's
13 files. Remember he denied "I didn't know about the Sweet
14 Spot." This came from his files. Okay. There's plenty
15:47:01 15 of testimony in this case and evidence that of course the
16 dealers knew about the Sweet Spot. They knew that it was
17 changing.

18 This is a summer meeting. Kraus. Tech,
19 '05, do you see that? Pop ahead, Bob, to the highlighted
15:47:19 20 part. Same as what we're looking at, okay? The numbers
21 have gotten to this range, ten to a hundred. This is
22 where we're aiming, and it is a marketing effort. Look.
23 That's where the money is.

24 Maybe it's cheaper, each sale's smaller,
15:47:33 25 but look how wide it gets, right? There's lots of

1 customers out there that are smaller companies.

2 And then go to the next highlighted
3 section. Lowery likes to say "I didn't know about the
4 Sweet Spot." Well, of course he did. Right in this
15:47:47 5 document, these are '05, available to the dealers,
6 available to the customers in the way exactly that I've
7 explained it to you.

8 And why does it matter, why do I keep
9 saying '05? The only two documents that Hodell is saying
15:48:03 10 were fraud are 314, which is that Business One brief, and
11 617, which is the American Express piece.

12 And they're only talking about those little
13 sentences in there. And they're from 2003, right? And
14 here we are belting out to dealers, including their guy,
15:48:30 15 all this information about the numbers are lower, and you
16 can find it on the Internet. And Otto admits that they
17 knew before the license agreement that the numbers are
18 going down, but they're saying, "No, no, ignore all that
19 and just find for me that that true statement in those
15:48:49 20 '03 documents somehow was false," when it's not, "and was
21 intended to mislead, and I justifiably relied because I
22 shut my eyes and stuck my head in the sand and looked at
23 nothing else, including my highly customized solution
24 that had this giant IFE thing and ignored all this stuff
15:49:11 25 and just relied on that sentence."

1 You can't do that. You can't do it.

2 So we're getting close. I'm going to
3 skip -- oh, on the Sweet Spot point, remember, Dan Kraus
4 explained, think about a tennis racquet, right. We had
15:49:28 5 that 130 up there and it was the Sweet Spot? The Sweet
6 Spot's where it really cranks there, and that's a
7 marketing term and it's got a performance side to it,
8 okay?

9 But just because the number of users that
15:49:42 10 Hodel had was above -- was 80 plus 40, ended up 120,
11 just because it was outside of the Sweet Spot, doesn't
12 mean that it's not in our reasonable range, right.

13 We've sold to lots of customers in that
14 range, right. The 26-page list and all, we have lots,
15:50:00 15 lots of customers outside of the, quote, unquote, Sweet
16 Spot. You can still hit the tennis ball outside of the
17 Sweet Spot, and you can win the U.S. Open even if you
18 don't hit it in the Sweet Spot. Just get it over the
19 net, and you're in the U.S. Open, you're in the finals,
15:50:20 20 you've won. Okay.

21 We've won. There are a lot of great
22 success stories and a whole 26-page list of them and they
23 don't all have to be in the perfect Sweet Spot.

24 Next, very quickly, they promised a test
15:50:36 25 prior to go-live. Remember that? We looked at 121.

1 Just call it up real quick, Bob. Go to the
2 7 I think, I guess it is.

3 Yeah. Look down. Can you blow that up,
4 please? This is the -- remember, there were the early
15:50:53 5 performance issues, Dan Kraus testified he wasn't
6 involved, he heard that some stuff had come up, his
7 people were looking into it. Then they went away and we
8 didn't hear anything until after go-live.

9 But we did have this call, it was the March
15:51:09 10 15th call, and these are IBIS/LSi's records about the
11 call. Look what they tell us. They're going to work
12 closely to determine -- with us to determine expectations
13 and needs for the project, which they didn't do. All
14 right. The evidence on that never appears in this case
15:51:24 15 because it didn't happen.

16 "At present, we're planning to stage a
17 similar test environment in the near future at Hodell
18 with the actual configuration that's in place for the
19 system."

15:51:37 20 To develop, software people, like people
21 that work in this, this is a big statement. We're going
22 to do the hard core testing that we talked about, get a
23 bunch of users pounding away on the keys. It's going to
24 be a similar test environment with the actual
15:51:50 25 configuration.

1 They didn't do that. They admit that.
2 They talk about how, "Oh, well, we think we did enough."
3 They didn't do what they said they were going to do. And
4 they had problems when they went live.

15:52:07 5 But we don't even know. We just get this
6 and we figure, good, let us know if you have any problem.
7 We don't hear anything until after go-live.

8 Next, sorry, these guys shouldn't have gone
9 live the way they did and they shouldn't have gone live
15:52:30 10 without a net, okay? I'm not going to go through this.
11 You'll see this is a skinny chapter.

12 There's a lot of evidence. Greg led a lot
13 of this. Go-live was delayed, delayed, delayed, delayed.
14 Witnesses arguing really theoretically about should they
15:52:48 15 or shouldn't they have gone live. They obviously didn't
16 do the testing that they said they were going to do, and
17 they obviously shouldn't have gone live because if it was
18 half as bad as they say that it was, then they weren't
19 ready, but the one that jumps out to me that's the best
15:53:07 20 is this idea that they went live without a net. Right?

21 They had FACTS and they're running FACTS,
22 and you can go live and keep what people call the Legacy
23 System, which is your old system, running at the same
24 time.

15:53:25 25 Now, it can be annoying and it can chew up

1 a lot of work, but when you're seeing the kinds of things
2 that they were seeing, when there's a reasonable
3 debate -- and I think we have a better side of it -- but
4 at least a reasonable debate that maybe you shouldn't
15:53:42 5 have gone live at all, you're crazy if you go live
6 without the parallel system.

7 And Mr. Guembel comes in here, and Mr. Star
8 got him to admit in five minutes that Mr. Guembel would
9 be embarrassed if he was associated with an
15:53:58 10 implementation like this that went live without a, quote,
11 unquote, net, meaning keeping the parallel system because
12 you can just stop. If it didn't work, turn off, oh,
13 shoot, wow, worse than -- we should have known because we
14 know from all the records now that we shouldn't have gone
15:54:16 15 live, they would realize, yeah, everything is the way we
16 kind of thought or should have known it would be. Go
17 back with FACTS and recheck.

18 They didn't do it. They went bing, bang,
19 boom. Right? Not smart.

15:54:32 20 So after go-live, right, what happens?
21 They go live, and they have a problem. They're back and
22 forth. They make a quick study of finding our phone
23 numbers and e-mails and all of that after keeping us in
24 the dark, which was normal prior to the sale, but then
15:54:47 25 after the sale when they were having the problems like

1 they really botched that part of it, but gee whiz, when
2 go-live happened and they had problems, you know, they
3 pounced.

4 Most of Hodell's case in the two and a half
15:55:02 5 weeks that we've been here is obsessively focused on what
6 happened after go-live. Okay?

7 And Exhibit 69, Udi Ziv, they have that
8 e-mail, and they are pounding away at it. It literally
9 was the majority of their opening, their case in chief,
15:55:24 10 and their closing, okay? And that tells you something.

11 This case isn't about what happened after
12 go-live. This case is about what happened before
13 go-live, and if you're them, and all you got is a couple
14 sentences that are totally true and this idea that Penny
15:55:41 15 said something that she didn't say, you better dig. And
16 they're out there digging trying to make an issue of
17 something that's actually way afterwards and not part of
18 this case.

19 But we're going to talk about the records
15:55:52 20 because they don't say or -- they don't say or suggest
21 what Hodell says that they say or suggest, so let's start
22 with number one, Exhibit 69.

23 Okay? But let's back up. Let's do it
24 right. Go to the bottom, okay? All of them -- sorry,
15:56:15 25 not just that page. I should have said all the way to

1 the bottom -- right. Scroll up a little bit so we can
2 see. Right there. Scoop.

3 So Dan Lowery, on April 11th, writes his
4 famous e-mail, or sends off what Hodell thinks is a
15:56:32 5 famous e-mail -- that's better -- to Udi Ziv, and he
6 copies the most senior executives at SAP whose e-mails he
7 can find. Right? He's got Dan Kraus, Paul
8 Killingsworth, we heard from him. He's very senior,
9 okay? Michael Sotnick, and Bill McDermott, who was the
15:56:51 10 CEO at the time of SAP America. Dan is going over
11 people's heads and other people's heads and just
12 screaming.

13 Okay. And what does he say?

14 Reseller, St. Louis, 120 users. But this
15:57:06 15 is the part that gets me, look at the bottom. "He's
16 losing hundreds of thousands of dollars a month from lost
17 orders, lost customers, and extra employees."

18 We know that's not true. They didn't lose
19 any sales. They didn't lose any customers. Okay. And
15:57:22 20 they weren't losing hundreds of thousands of dollars a
21 month. We know that that's not true.

22 "They're close to tossing this thing out."

23 We know that's not true. They kept it for two years.

24 "And if they toss it out, they're getting legal."

15:57:37 25 So this is an extreme e-mail sent to

1 super-senior executives where he's saying it's a
2 towering -- I call it the towering inferno. He's saying
3 "There's a building on fire." I remember the Towering
4 Inferno movie when I was younger, and "The building's on
15:57:53 5 fire. Oh, my gosh; oh, my gosh; oh, my gosh."

6 And then what happens? Right? Scroll up.
7 Udi Ziv reacts. Go up. Right there.

8 This is the language that we've seen,
9 right? What does Udi Ziv know? Udi Ziv knows it's a
15:58:19 10 towering inferno and they have 120 users, so he reacts.
11 It's an emotional e-mail copied to senior people and he
12 says, "Whoa, I know that it's 120 users. It's not
13 working. That must be a problem," because it's like
14 self-proving it must be a problem because the building's
15:58:37 15 on fire. "It's way outside of any sane Sweet Spot."

16 So what Hodell likes to say is, "Oh, yeah,
17 so here's the thing. SAP kept this a secret, and SAP's
18 wrong that this was an emotional exchange, and that it
19 had and other things had an effect on SAP afterwards."

15:58:58 20 And our point is no, no, no, no. This was
21 an emotional reaction, and then there were subsequent
22 events that further kind of raised our emotions, and we
23 had some initial comments that we made that people later
24 corrected because the product actually improved after we
15:59:15 25 did a lot of work on it.

1 And I want to walk you through, without too
2 much detail, and show you that's what happened. We
3 didn't keep any secrets, and we emotionally reacted
4 early. We dug in and worked hard and then the thing
15:59:33 5 improved and, of course, we found out what we found out,
6 which was the big problem was In-Flight.

7 Look, for example, at 70. That's the place
8 to go. Wait a minute, go back, please.

9 Check date, all right? April 12th, Udi Ziv
15:59:54 10 to Kraus. Go to 70 now. This is on the page. They like
11 to say SAP kept this a secret. They don't talk about 70.
12 We do. The next day, Udi writes to Lowery, "As you know,
13 this customer's environment is far outside the Sweet
14 Spot."

16:00:13 15 So number one, they didn't try and conceal
16 what Udi Ziv thought. The most prominent statement that
17 he made in his e-mail and that Hodell is so focused on
18 now, we passed along to Lowery, Hodell's guy, right away,
19 the next day, here you go. And then look at what happens
16:00:38 20 next, right?

21 We learned more from Hodell. And as far as
22 this kind of, "Hey, we keep secret stuff," we tell them
23 more, and the best proof of that is this big call that
24 took place on April 17th, 2007.

16:00:56 25 And go to that, please, 151, and see if you

1 can scoop, like, I don't know, what is it, one to three?
2 That's probably a good -- there's a very tense and high
3 emotion call on the 17th of April.

4 Hodell is on the call. Otto Reidl is on
16:01:15 5 there. IBIS/LSi is on there. And senior SAP executives
6 are on there. Okay. And we learn a lot on this call.

7 Remember, we haven't known much from these
8 guys.

9 "We had a call this morning."

16:01:29 10 "One, LSi commented that they originally
11 sold this solution" -- that's code for got something on
12 top of it, right; it's not just B1 -- "as something that
13 was designed for companies of 250 million in revenue with
14 up to 500 users. There was a stunned silence on the
16:01:49 15 phone from the SAP team as Hodell confirmed that this was
16 their understanding of what was purchased."

17 This is the first time people at SAP are
18 going, whoa, they got this big In-Flight Enterprise on
19 top of our product, they've told us now, you know, we've
16:02:11 20 known for a month or so that they've had these issues.
21 We've investigated and we realized what we didn't know at
22 the time of the sale, which is their transaction volume
23 is off the charts or they're high; but not just that,
24 they want 500 users.

16:02:24 25 So they want, like, they want to just

1 pivot, right, and it's going to be -- and it's a towering
2 inferno, at least that's what Lowery says. We know
3 that's not true, but that's what everybody on the call
4 thinks.

16:02:39 5 And then they go on, "Hey, we got 120. And
6 it's not working." The building's on fire. It's a
7 towering inferno. "We grow at 17%."

8 Okay. 17% growth rate, if you divide the
9 number 72 by 17, you can tell how many years it takes to
16:02:58 10 double it. It takes four and a half, something like
11 that.

12 So they're saying, "Hey, we're going to
13 grow fast. We're going to be at 300 in no time. We've
14 lost our profit, and we have 750,000 in losses already."
16:03:08 15 They're one month in.

16 And we know that's not true, all right,
17 because if it was 25 months, and it was 750 a month, it
18 would be a totally different -- we know that's not true.
19 They haven't lost any customers. We know also -- but,
16:03:20 20 this is more towering inferno, okay.

21 But, then look what happens next. This is
22 what we hear. That's the "stunned silence." Go down,
23 Bob, to some other paragraphs. Right.

24 Fine. Four, Dirk Boessmann, he did an
16:03:35 25 excellent job. He set expectations that, "This

1 environment is much" -- that's everything. That's the,
2 this, all right, with the big In-Flight on top, that's
3 the transaction volume, "This environment" all caps,
4 "Larger than we were led to believe and that we cannot
16:03:53 5 make any statements as to performance" and he goes on
6 "Without some testing."

7 So they're having this big call. The
8 customer is on the phone. The dealer is on the phone.
9 Senior SAP people are on the phone. These are the notes
16:04:06 10 from the call. Right. SAP's -- you know, this is an
11 internal set of notes. Everyone who was on the call and
12 plus some other people were getting these notes. This is
13 what happened. Okay.

14 And they tell them, "We're not making any
16:04:20 15 statements as to performance." Is that the word? Yeah.
16 That's a big deal. If you're Otto Reidl, and you're on
17 the phone -- oh, or Dan Lowery. And they are both on the
18 phone, okay. These guys, when you came to them with your
19 towering inferno, they said, "Hey, your environment is
16:04:37 20 way off the charts. We can't make any statements," and
21 there's more.

22 In Paragraph six, we're talking to them
23 about maybe you shouldn't be on B1. This is all about
24 All-In-One.

16:04:49 25 And look at eight. Let's go a little bit

1 lower. There you go. Oops, you had it. "The call was
2 left with SAP going back to executive management to
3 determine if they have a solution or not."

4 So all what we've heard, especially in the
16:05:12 5 opening and there were hints of it during the trial, and
6 there was some of it in the close, too, that we kept
7 stuff secret. We gave Udi Ziv stuff the day we got it or
8 the day after, and when they told us what they told us,
9 we told them what we told them, which is a lot.

16:05:28 10 And look at 18. Even Otto's notes. Otto
11 acknowledged these are his notes of the call, that they
12 were at the high end of the solution capability.

13 When you hear that as a customer, that's no
14 minor thing. You're telling people you have a towering
16:05:47 15 inferno, you have a big call. They didn't say,
16 "Everything is cool. We'll fix it in no time." They
17 tell him, "Hey, you're out there." Okay? So there's no
18 kind of secrecy issue.

19 So what happens? There is an emotional
16:06:01 20 reaction to this. After this, there are a series of SAP
21 e-mails, Dan Kraus, Ralf Mehnert-Meland, and others that
22 are pessimistic that B1 is a good fit for these guys.
23 And who couldn't imagine the crowd mentality with the
24 towering inferno and Udi Ziv's comments and everything
16:06:19 25 that happened during the April 17th call.

1 And I'm not going to bore you through this,
2 but look just to one or two. Look at 159. Scroll down.
3 You got to go down to blow this -- all right. Stop.

4 This is -- these are the call notes, right?
16:06:47 5 We've seen this. April 17th at 11:09. Okay. Now,
6 scroll up. Dan Kraus is copied on this. So he responds,
7 right, and this is one of the e-mails that Hodell likes
8 to point to where SAP, obviously in their view, admitted
9 this is --will never work and et cetera, et cetera. It's
16:07:09 10 nine minutes after he got the notes.

11 "Towering inferno. Holy smokes. Big
12 volumes. Big add-on. They're going to 500 users. And
13 the building's on fire."

14 I'm not surprised that he said that. And
16:07:23 15 there's another one, 158, and there are more. It's not
16 like this went away in a day. This extended for a period
17 of time. But 159's another one that's Ralf Mehnert.
18 He's 20 minutes after, chiming in. He says something
19 negative. Yeah, he does.

16:07:37 20 "Neither of those guys work for us anymore.
21 Dan's not really involved with SAP. He said it was a
22 small part of his business. We come in and ask him,
23 what's the deal. That's what I said, that's how I felt
24 at the time. Then what did you think? We worked hard
16:07:50 25 and we improved the solution, and they never should have

1 left the solution."

2 So let's talk about that next. Oh, yeah.

3 "We worked hard and there are improvements." Meetings,

4 calls, e-mails, site visits, SAP when they finally heard

16:08:16 5 what was going on, they pounced on this. They pounced on

6 this. Paul Killingsworth, remember he wrote that little

7 note. He had 333 e-mails on this. He talked about

8 spending thousands of hours. I'm not going to call this

9 up. Remember we asked him point blank, "Hey, how was

16:08:32 10 it?" I'm going to try, without talking fast move, to the

11 end.

12 He said, "We worked our blankety-blanks

13 off," okay, and he went on to explain; it was thousands

14 of hours. They attacked this, and there's the suggestion

16:08:47 15 from Hodell that we like abandoned them and tossed them a

16 couple of patches.

17 That's not true. Eddy Neveux, he's never

18 made a site visit to a customer before. He was at this

19 site and he worked very hard on it. All right.

16:08:59 20 I've got to go through a couple of these.

21 How are we doing?

22 Okay.

23 THE COURT: Whatever you want.

24 MR. MILLER: Thank you, Your Honor. I

16:09:08 25 know. I'm trying to be respectful of everything, but

1 I'll just be quiet and keep moving at least. Be quiet
2 about that.

3 Look at 320. It gets better. And again,
4 you can't, I can't go through all the evidence, all the
16:09:22 5 testimony and the exhibits, but I could go through some
6 things that matter.

7 Patch Level 25. The first patch didn't
8 work too well, Patch Level 23, right after the April
9 call, okay. But, Patch Level 25, which came out in May,
16:09:36 10 it made a big difference. And this is Lowery reporting.
11 Gee whiz, that's really a bad text. All right. Scoop
12 that. This is Lowery reporting on Patch Level 25. Just
13 go down to the bottom. That's what we really want. See
14 if we can see it. Holy smokes.

16:09:51 15 "The installation of Patch 25 was over the
16 weekend." Thank you. "Shown improvements. No more
17 lockups."

18 Okay. If you scroll to the top, Jon
19 Woodrum goes there with his son, and he visits St. Louis.
16:10:06 20 Okay. Scoop that, the whole thing. Right. The visit to
21 the St. Louis store, this is right afterwards, is a
22 really good one. And look below. It's just an
23 anecdotal, but they had a 91 line order. They had no
24 problems with it.

16:10:21 25 Does that mean like oh, my gosh everything

1 is great? No, but that's the beginning of this thing
2 turning the corner, and it continues to get better.

3 Look at -- skip ahead. I want to skip some
4 in the interest of time. You guys have all the exhibits.
16:10:36 5 You can go back. If you can remember, look at 258. But,
6 89. It's skipping 258 and going right to 89.

7 There was another version of B1 that came
8 out 2007. Okay. And there have been subsequent versions
9 since then which is why they should have stayed with B1.
16:10:59 10 This is about the 2007 version. Paul Killingsworth is
11 reporting. Okay. "Hey, performance is improved for
12 customers between 20 and 80%." They should have gotten
13 that version.

14 Look at 307. Skipping around now. I'm
16:11:19 15 skipping some of my -- I'm on my fun ones. 307. Another
16 patch comes out. A patch is, we're going to improve the
17 product. Right. So there's versions. They come out
18 different years, and patches are like interim
19 improvements. Hey, they put on Patch Level 29, over 25.
16:11:40 20 They have a 500% performance increase. This is real.
21 This is starting to matter.

22 And then go to 166. Paul -- pardon
23 me -- Ed Neveux makes the site visit. Okay. Look what
24 he says. This is when he ran and got that Net Profiler
16:12:01 25 tool. This guy is a solution architect. Everybody

1 deferred to Eddy. I mean, I don't -- I'm not sure
2 whether that came across to you, but this guy knows what
3 he's talking about. In the e-mails and in conversation
4 and the way he carried himself, this guy, he's one of six
16:12:16 5 solution architects in the world. The guy is tech savvy
6 and sincere and he went there and hooked up his Net
7 Profiler solution.

8 And these tech guys, they don't care. Tell
9 them if it doesn't work, he's going to say it doesn't
16:12:30 10 work. And he says, "I hooked it up, and it runs a lot,"
11 right? Remember Hodell has never videoed this. They
12 have never done any of this, which is a whole other
13 story.

14 He runs a lot and the worst he sees, the
16:12:46 15 worst he sees is a nine-second delay. His comment, "Hey,
16 performance isn't that bad."

17 And this month that he's here, October,
18 '07, he's there all day. There's none of this morning
19 nonsense where they like to say you were there when we
16:13:02 20 weren't busy. We don't get busy because our time zone is
21 later. He's there all day, the second busiest month that
22 they had in 2007, and he says looks good. I don't want
23 to misstate it. He says what he says. "Performance
24 isn't that bad." It's certainly getting better.

16:13:19 25 Okay. And remember they ran this for two

1 years, and it continued to get better and it has
2 continued to get better. And like I said multiple times,
3 it's too bad they didn't stay on it.

4 Very quickly on a side issue. Response
16:13:35 5 time. The testimony is clear. I want you to understand
6 these delay things. When you type the keys and you move
7 the mouse, everything happens in real-time. Just like
8 when you're on Amazon and you're buying a product, click
9 click, click, you're moving all around. Okay.

16:13:55 10 When you're buying five things you want to
11 buy from Amazon and you click checkout or whatever the
12 final step is, when you've entered your information to
13 pin, and you get a little icon, that's what's getting
14 measured in these tools when we're talking about delay.
16:14:11 15 And the reason that matters is like some of their sales
16 orders, we've heard. They're like huge, like somebody
17 orders a bunch of these bolts and that bolts and these
18 nuts and those nuts, they take like two hours to enter.

19 Okay. If you enter something for two hours
16:14:28 20 and it takes nine seconds, it would be like boom, and out
21 the door it goes. Everything was in real-time until you
22 hit enter at the very end. That's fine. We've had the
23 experts come in.

24 Guembel admitted, and Mr. Star took him
16:14:42 25 through it. And what's unacceptable is above a minute.

1 He had below, he comes in here and says sub second.
2 Well, it's not -- this was in 2005, not 2015. And he's
3 wrong. This is business management software. When you
4 enter an order -- and the evidence, by the way, in the
16:15:00 5 case is that Hodell's average order line is four lines
6 long. Four lines lock, okay. So not all huge, but I
7 want you to understand when they are huge and we're
8 talking about a nine-second delay, it's not like nine
9 seconds every time you hit a key. It's at the very end
16:15:16 10 and that's fine. You've heard from the professionals on
11 that.

12 IFE. IFE was a big part of the problem
13 here. Eddy Neveux, in his entire career, never visited a
14 site. He goes out in October of '07 to test the system,
16:15:33 15 right? He uses what he called a B1 testing environment.
16 It's basically going to test what they did. And what did
17 he find? He told us; they did not follow the best
18 practices because there was -- and it resulted in too
19 much information going back and forth in the DI API pipe.

16:15:58 20 This isn't that complicated once you
21 understand what they're saying. B1 and then IFE, right?
22 IFE is bigger than B1, and they have to transmit
23 information back and forth.

24 B1 has a pipe, not a real pipe. It's
16:16:12 25 software code, and we cleared that up. But, the question

1 is what's wrong here. Is the pipe too small? Or when
2 the IBIS and LSi guys wrote IFE, are they pumping too
3 much information through the pipe? Okay?

4 Eddy Neveux was clear, "Hey, it's not the
16:16:35 5 pipe. These guys are nuts, they're pumping all sorts of
6 -- overcommunicating back and forth. And he did a report
7 on it, 809. And once you kind of understand the
8 principle, it comes alive to you.

9 Skip that one. This is October, 2007.
16:16:49 10 It's Eddy's report. He did the DI API, you know, the
11 testing environment thing, BlTE, testing environment.
12 And are his conclusions, and I always skip the first one
13 because the highlighting will give you a headache. My
14 screen is blank.

16:17:10 15 Okay. So this is 809. We can look at
16 this, but it's not even worth it. Bob, just go to the
17 next one. Well, okay, fine.

18 There's no doubt that the In-Flight does
19 overhead with spec with memory consumption is the current
16:17:25 20 version. He has a bunch of numbers. He's talking about
21 there's too much communicating going on but read down.
22 Go to the next highlighted section. It's way more clear.

23 He gets into it. "There is an excessive
24 amount of talk or communication between In-Flight and
16:17:42 25 Business One." And there are others in here that I think

1 I missed. And then he goes on to explain how they're not
2 using the filters in the right way, and it's kind of
3 technical, but this guy went here and he's saying wait
4 it's not the DI API pipe; it's the code that these guys
16:18:02 5 wrote.

6 And look at -- he's not alone, by the way.
7 Everyone who looked at this reached the same conclusion.

8 Look at 167. He involved that woman
9 Trinidad, and she was one of the other six solution
16:18:14 10 architects. I always picture her like in Trinidad or
11 something. I don't know where she actually was. But go
12 down -- oh, fine. There should be highlighted sections.
13 Yeah. Here we go. She reports to him. She was working
14 with him, right. She's looking at the code. She's
16:18:32 15 asking him, "Hey, what are your conclusions?" Because he
16 had done the BITE testing environment thing, and we just
17 saw his conclusions. So I don't think she had seen them
18 yet. "Did you have a look at their code? I'm interested
19 in knowing," and then she's got it, too. "There are many
16:18:48 20 points that let me think their code is a very big mess or
21 I'm missing something in their development," and she goes
22 on to explain. She cites this event. This is a thing,
23 like the program does a step.

24 "That's far way too often and shouldn't be
16:19:05 25 used." And then she goes down another example. "There

1 are some lines repeated too many times, and I don't know
2 why. Here you have some samples of the most repeated,"
3 and she gives the number of lines. And it gets kind of
4 technical, but look at the part on the bottom.

16:19:20 5 She's throwing exclamation points out in an
6 internal e-mail between two tech people saying this is
7 crazy; this thing doesn't work right. It's firing too
8 often, 700 times, you know, 650 times for a unique event.
9 Something that's supposed to happen once is happening 650
16:19:37 10 times. It's messing up the program because it's clogging
11 the pipe.

12 And now how else do we know? We brought in
13 Joe Guagenti. And he doesn't work for us. He's the guy
14 who wrote IFE and he came in here last Friday and
16:19:53 15 testified.

16 Can you call up -- let's go to his
17 testimony. I'll get right to it. I think we're missing
18 one. Go back. 2372, 21. Should be the quote right
19 before this. It's important. I can tell you what he
16:20:23 20 said.

21 "Hey, what's wrong? They flooded the pipe.
22 In-Flight flooded the pipe."

23 Is that it? No. We'll come back to it if
24 we have to. Just keep going. He said, "It flooded the
16:20:35 25 pipe." And then we asked him, "And in your view, the

1 vast majority of the performance issues were caused by
2 In-Flight?

3 "Answer: Yes."

4 If you look at 217 -- I'm going to skip
16:20:53 5 217. Remember the Bilas report, right? The Bilas report
6 is critical of putting too much information in the pipe,
7 also. Okay?

8 But I want to go to 901. That's not the
9 part. You'd have to read it, but go to 901. This is a
16:21:11 10 report, right, from Gadi Barnea. Go down here and just
11 get the highlighted parts.

12 "It's not only that the majority of the
13 issues are driven by the add-on." That's In-Flight.
14 "They are also the highest priority," et cetera, et
16:21:32 15 cetera. And then he attaches a report at the end. They
16 ran some tests. Go to the end, please.

17 I'm not going to get into any detail, but
18 you'll remember this. We've seen it. Great. Highlight
19 the two columns on the right. So they ran some steps
16:21:48 20 using In-Flight and then ran some steps not using
21 In-Flight. And when you used In-Flight, it was a
22 problem. And when you didn't use In-Flight, it wasn't a
23 problem.

24 These are all seconds, right? And the far
16:22:02 25 right is without. And the second one in is with. So it

1 took nine seconds with it, two without it. And then some
2 of them are dramatic, right? 766 seconds. And only 100
3 and then 900 seconds and 28. Okay. I'm moving fast now.

4 Then Guembel comes in here. How dare he
16:22:26 5 come in here or how dare they come in here and criticize
6 B1 on articles that are from 1995 when the Internet was
7 barely existing and not take a look at the In-Flight
8 code? Because you stack that on top, all software can be
9 stressed. All computers can be stressed if you ask them
16:22:46 10 to, you know, your iPhone to fly the space shuttle to the
11 moon, it's going to have a problem. And how dare he come
12 in here and talk about B1? He was wrong. I'm not going
13 to get into the details, but how dare he do that without
14 looking at the In-Flight code?

16:23:01 15 The In-Flight code, you can't do it.
16 Hardware? It was part of the problem. Eddy
17 Neveux -- Guagenti, remember Joe Guagenti talked about,
18 "Oh, it's like a car without any wheels." And what did
19 Hodell do? A little tricky. They crossed him on, "Oh,
16:23:23 20 you're not an expert." It was really interesting. Tried
21 to make it sound like you can't be trusted on anything
22 having to do with IT.

23 And good for him; he held his own, okay,
24 because he is an IT expert. He does know what he's
16:23:35 25 doing. And yes, he's not a certified hardware expert.

1 That's the word he used, "I'm not certified, but I can
2 tell if a car doesn't have any wheels on it, that it's
3 not going to drive, and I can tell you or someone where
4 the A key is on the keyboard." And he had issues with
16:23:51 5 the hardware.

6 And yesterday in rebuttal -- which was kind
7 of strange, I thought the case was over -- they bring in
8 Joe -- remember they put on all their witnesses, then we
9 put on ours. And then they brought in another witness,
16:24:03 10 that guy, Joe Vislocky, okay. Thanks. Okay?

11 Joe admitted that the servers were
12 struggling. Joe admitted that they had to go get the
13 switches that Greg was asking them about that had a
14 1,000% performance increase in connection with whatever
16:24:23 15 they touched. He admitted he dropped 30 grand and
16 getting 30 grand out of Hodell really takes something on
17 new hardware, and that they needed the new hardware. So
18 that's enough on hardware.

19 THE COURT: Let me ask you, Mr. Miller.

16:24:36 20 MR. MILLER: Yes.

21 THE COURT: I know there are some subjects
22 you haven't even broached yet.

23 MR. MILLER: I could finish quickly if
24 that's what you'd like.

16:24:43 25 THE COURT: No, I'm saying we could break

1 now and you can finish in the morning because their
2 rebuttal will take some period of time.

3 MR. MILLER: Yeah.

4 THE COURT: And I'm feeling the pain of
16:24:54 5 Shirle and Sue enormously because easy for us to sit here
6 and listen, or sometimes it's not, but I mean and -- but,
7 for them, it's unbelievable what they're going through in
8 this case.

9 MR. MILLER: Can I -- what time is it,
16:25:09 10 please?

11 THE COURT: Almost 4:30.

12 MR. MILLER: Okay. Sure. Take a break.

13 THE COURT: Thank you. Is the general
14 there?

16:25:28 15 Okay. Folks, believe me --

16 THE CLERK: All rise.

17 THE COURT: Hang on. You really have heard
18 almost everything, right, but you haven't heard
19 everything. It's still important that you keep an open
16:25:39 20 mind until everything is given to you.

21 So keep the faith until tomorrow and the
22 case will go to you for your consideration.

23 Have a good night's rest. Thank you for
24 your promptness and attention, and we'll see you 8:15
16:25:51 25 where, Mr. Panigutti?

1 A JUROR: L-1.

2 THE COURT: All right.

3 THE CLERK: All rise for the jury.

4 (Jury out) .

5 (Court adjourned at 4:30 p.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Susan Trischan

/S/ Susan Trischan, Official Court Reporter

Certified Realtime Reporter

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